90-781

No.

Supreme Court, U.S.
FILED
NOV 15 1990
JOSEPH F. SPANIOL, JR.
CLERK

IN THE
Supreme Court of the United States
October Term, 1990

141ST STREET CORPORATION, by MARK HERSH, managing agent of the Defendant In Rem,

Petitioner,

-against-

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

SANFORD H. GROHMAN
JEFFREY B. GROHMAN*
GROHMAN & GROHMAN
Attorneys for Petitioner
200 Park Avenue, Suite 303 East
New York, New York 10166
(212) 986-2515

**Counsel of Record*

Dick Bailey Appellate Printers ► Tel.: 1-800-564-4918 ◄
(212) 608-7666 — (718) 447-5358 — (516) 222-2470 — (914) 682-0848
Fax Number: (718) 273-8031

QUESTIONS PRESENTED

I. Whether knowledge or consent of drug dealing in an apartment building can be imputed to a corporation and its shareholders through their superintendent prior to trial upon an *IN LIMINE* motion, or whether knowledge or consent through the superintendent's agency should be factually determined by the jury?

II. Whether in a real property forfeiture action under 21 U.S.C. §881(a)(7), the facts needed to assert an innocent owner defense are determined by the language of 21 U.S.C. §881(a)(7) or are the same as for forfeiture of personal property where there is no statutory language?

III. Whether Petitioners were denied a fair trial when the Trial Court (a) granted the pre-trial *IN LIMINE* motion finding "[a]s a matter of law that any knowledge of and consent to illegal activity on the premises established in Defendant's employee Nahamias is attributable and imputable to the West 141 Street Realty Corporation," (b) charged the jury to that effect and, (c) utilized an inapplicable innocent owner defense in its charges to the jury, thereby eliminating the innocent owners defense as to the corporation and shareholders and requiring proof of facts not required under the statute?

IV. Whether shareholders of a corporation are members of the class of owners protected by the "innocent owner defense" under 21 U.S.C. §881(a)(7) in a forfeiture action against an apartment building?

V. Did exigent circumstances exist sufficient to warrant ex parte seizure of an immovable six story building without prior notice?

PARTIES

The Petitioner herein is 141st Street Corporation by Mark Hersh, originally appearing as a claimant at trial, and as Appellant in the U.S. Court of Appeals for the Second Circuit.

The Respondent herein is the United States of America, originally the Plaintiff at trial and the Respondent in the U.S. Court of Appeals for the Second Circuit.

The Defendant herein is All Right Title and Interest in Real Property and Buildings known as 617 West 141 Street, the Defendant at trial and in the United States Court of Appeals for the Second Circuit.

Fifteen Leasehold Interests were Defendants at trial. Default judgments were entered against them for failure to interpose a claim or file an answer.

Stanley Weg made a motion to intervene immediately prior to trial on the basis that as a ten percent shareholder in the Corporate Claimant, he had a right to assert a separate innocent owner defense under 21 U.S.C. 881(a)(7). Such motion was denied.

---

*There is no parent or subsidiary company to be listed.

TABLE OF CONTENTS

	PAGE
Questions Presented	i
Parties	ii
Table of Contents	iii
Table of Authorities	v
Opinions Below	1
Jurisdiction	2
Constitutional and Statutory Provisions	2
Statement of the Case	2
REASONS FOR GRANTING THE WRIT	8
A. The Innocent Owner Defense Under 21 U.S.C. §881(a)(7) Was Denuded Of Efficacy When The Trial Court Ruled In A Pre-Trial Motion In Limine, That As A Matter of Law, As An Agent Of The Corporation, The Superintendent's Alleged Illegal Acts Were Imputed To The Corporation	8
B. The Trial Court's Ruling *In Limine* And The Trial Court's Departure In Its Charges To The Jury From Clear Statutory Language To A Constitutional Interpretation For A Different Forfeiture Statute So Changed The Proof Required That Petitioner Was Denied A Fair Trial	16

C. Preseizure Of The Apartment Building By Ex Parte Application Without Notice Pursuant To 21 U.S.C. §881(a)(7) Violated Petitioner's Constitutional Right To Due Process Of Law (U.S. Constitution, Fifth Amendment)..... 18

Conclusion 22

Appendix 1a

Judgment of the United States District Court for the Southern District of New York 1a

Memorandum Endorsed 2a

Opinion of the United States Court of Appeals for the Second Circuit..... 5a

Constitutional and Statutory Provisions 30a

TABLE OF AUTHORITIES

CASES PAGE

Armstrong v. Manzo, 380 U.S. 545 (1965).....19

Boddie v. Connecticut, 401 U.S. 371 (1971).....19

Calero Toledo v. Pearson Yacht Leasing Co., 416 U.S. 663 (1974).....15,16,17,18,21

Essig v. U.S., 675 F.Supp. 84 (E.D.N.Y. 1987).....11

Matthew v. Eldridge, 424 U.S. 319 (1976).....19,20

McLoughlin R.R.Co. v. N.Y. Edison Co., 252 N.Y. 202 (1929).....11

Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306 (1950).....19

New York v. Burger, 482 U.S. 691 (1987).....20

Palmerin v. Riverdale, 794 F.2d 1409 (9th Cir. 1986).....14

Petrovsky v. U.S., 726 F.Supp. 890 (N.D.N.Y. 1990).....10,11

Re Smathers Estate, 153 Misc. 132 (Surr.Ct., West.Co. 1934).....12

Riviello v. Waldron, 47 N.Y.2d 297 (1979).....10

Rounds v. Delaware Lackawana and Western Rail Road Co., 64 N.Y. 129 (1876).....11

U.S. v. One 1981 Datsun 280ZX, 644 F.Supp. 1280 (E.D.Pa. 1986).....18

U.S. v. Property at 4492 S. Livonia Road, 889 F.2d 1258 (2nd Cir. 1989).....19,21

U.S. v. Lots 12, 13, 14, 15 and 16, etc., 869 F.2d 942 (6th Cir. 1989).....18

U.S. v. Parcel Known as 6109 Grubb Road, 866 F.2d 618 (3rd Cir. 1989).....18

U.S. v. Premises Known as 171-02 Liberty Avenue, 710 F.Supp. 46 (E.D.N.Y. 1989).....18

U.S. v. 141st Street Realty Corp., 911 F.2d 870 (2nd Cir. 1990) 13,20,4a

Williams v. U.S., 350 U.S. 857 (1955).....10

Statutes and Rules:

U.S. Constitutional Amendment Five 16,18,19

21 U.S.C. §881(a)(7).....9,14,15,16,17,18,22

New York Penal Law §20.20.....12

New York Real Property Actions And Proceedings Law §853 7

Other Authorities:

Prosser, Torts [4th Ed.] §70, pg. 461 11

Restatement of Agency 2d §229.....11

45 U. of Cin.L.Rev. 235 11

IN THE
Supreme Court of the United States
October Term, 1990

141ST STREET CORPORATION, by MARK HERSH, managing agent of the Defendant In Rem,

Petitioner,

-against-

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

TO THE HONORABLE, THE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Petitioners 141st Street Corporation, by Mark Hersh, managing agent of Defendant, In Rem respectfully pray that a petition for a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Second Circuit.

OPINIONS BELOW

The opinion of the Court of Appeals (set forth at pages 4a to 28a of the Appendix to this Petition) is reported at 911 F.2d 870 (2nd Cir. 1990). The District Court Endorsed Memorandum Opinion on an *In Limine* motion determining that (1) any knowledge or consent to illegal activity by the superintendent was attributable to the Corporation and (2) a shareholder does not have standing to assert the innocent owner defense under 21

U.S.C. §881(a)(7) is reproduced at 2a, 3a. The Judgment of the District Court is reproduced at 1a.

JURISDICTION

The Judgment of the Court of Appeals was entered on August 17, 1990. The present petition was filed within ninety days of August 17, 1990. This petition is timely in accordance with the rules of this Court. Jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS

The constitutional and statutory provisions involved are the Fifth Amendment to the United States Constitution, 21 U.S.C. §881(a)(7), New York Penal Law §20.20, and New York Real Property Actions and Proceedings Law §853. The pertinent texts of these provisions are reproduced in the Appendix at 29a through 31a.

STATEMENT OF THE CASE

It is respectfully submitted that the decision of the Second Circuit Court of Appeals affirming the District Court's civil forfeiture judgment of an apartment building has swept 21 U.S.C. 881(a)(7) (hereinafter 881(a)(7)), with one sweep of the pen, into an area not envisioned by that statute nor by the Constitution of the United States. Given the ongoing national concern over drugs and the war thereon, Petitioner submits that the vital issues raised in this appeal and the associated constitutional rights and obligations involved under 881(a)(7) should be addressed by this Court.

This case involves the seizure of a 43 unit apartment building in Manhattan pursuant to 881(a)(7) under the Controlled Substances Act, Title 21 U.S.C. 800 et. seq. pursuant to an In Rem Seizure Warrant.

In that connection, an in rem ex parte seizure warrant was issued against the subject premises and the leasehold interests for 15 apartments on June 24, 1988 by a United States Magistrate (JA-312-315),* the same being executed on June 29, 1988. On that latter date, the 15 apartments were seized and sealed along with the seizure of the entire building. In conjunction therewith, search warrants were executed resulting in seizure of and the arrest of tenants.

Thereafter on July 7, 1988 a verified complaint was served in an action for forfeiture under 881(a)(7) along with the filing of a *lis pendens* against the real property (JA-4,5). Subsequent thereto, on July 20, 1988, the Petitioner, 141st Street Corporation (hereinafter Realty) filed a Claim on Realty's behalf asserting that the conduct alleged in the government's application for seizure, even if the allegations therein be true, occurred absent knowledge and consent of Realty.

On August 20, 1988, Realty served its verified answer raising the innocent owner defense under 881(a)(7) and on August 23, 1988 Realty demanded a jury trial. The actual trial time encompassed a four day period from October 31, 1989 through November 3, 1989.

Prior to the trial of the issues herein, usual discovery took place, i.e., examinations before trial, the entry of a Pre Trial Order after conferencing between the parties and the Court pursuant to FRCP 16. But, in addition to such customary discovery, plaintiff moved *in limine* using the Depositions of Mark Hersh, the managing agent of Realty and Morris Nahamias, Realty's superintendent (hereinafter superintendent and/or Nahamias) (JA-129, 130 and 311) to establish that any knowledge or consent by the superintendent was attributable, imputable and binding on Realty, regardless of either the absence of knowledge or consent on Realty's part under the innocent owner defense. Plaintiff's *in limine* motion was strongly opposed by Realty.

---

*References in this Statement of the Case are to the Appendix annexed to this Writ (-a); to the Joint Appendix in the Court of Appeals below (JA-) or to the Supplemental Appendix in the Court of Appeals below (SA-).

On September 26, 1989, as part of an Endorsed Memo, Hon. Kenneth Conboy, USDJ, ruled, as a matter of law, that Mark Hersh (Hersh) and Nahamias were not only agents of Realty but that any knowledge of and consent to illegal activity established in Realty's employee/superintendent Nahamias is attributable and imputable to Realty (2a,3a). (Please see Reason for Granting the Writ).

Thus, such finding on the Plaintiff's *in limine* motion summarily prejudged Realty's posture vis-a-vis the innocent owner defense under 881(a)(7) by placing Realty at Nahamias' mercy depending upon whether *he* committed any alleged illegal acts as a matter of law. The ruling, occurring prior to trial, effectively denied Realty from utilizing the innocent owner defense pursuant to 881(a)(7) by establishing Nahamias' conduct as the predicate for binding Realty regardless whether Realty had knowledge or disjunctively gave its consent (ratified) Nahamias' alleged illegal conduct.

In the same endorsed memo (2a,3a) Judge Conboy denied a shareholder's motion to intervene to protect his interest investment (Stanley Weg who held a 10% shareholder interest was the intervenor; another stockholder in this three stockholder corporation (55%), George Hersh—both these stockholders were passive and did not participate in the operation of Realty).

The district court's ruling on Weg's motion to intervene adopted the position of the Plaintiff, in effect, as pertains to a shareholder's position in a corporation, by holding, ". . . Mr. Weg, as a mere shareholder, does not have standing to intervene here." (2a,3a).

Thus, this or any other shareholder is effectively relegated to a derivative action against a corporation after trial and judgment, as here forfeiture, leaving such shareholder(s) a cause of action against an empty worthless corporate shell when 881(a)(7) gives an *owner* the right to raise the innocent owner defense as to an innocent owner's interest investment.

TRIAL

The U.S. Attorney in his opening statement explained to the jury that in the first part of the trial the government would present evidence of drug activity at the building which the law labels as probable cause. He went on to say that if the Court

rules in favor of probable cause, the burden shifts to the defendant Realty, to assert its proof—the innocent owner defense under 881(a)(7) (SA-10,11). The probable cause segment of the trial was tried before the jury.

The government's first witness was a Lieutenant Becker (Becker) of the New York City Police Department (NYPD) who first became aware of drug activity at the premises through an undercover agent who made a buy on the building's sixth floor (JA-365). Becker reviewed 20 complaints received by the NYPD (Joint Exhibit C & D, JA 361, 362). Such charts showed no complaints or arrests in the building's public areas.

As the person in charge of the investigation, Lt. Becker decided not to notify Hersh since it might hinder the investigation or endanger the undercovers. Becker felt that notice of NYPD's application for search warrants should be ex parte and secret because he felt Hersh knew of the drugs at the building or was working with the traffickers (JA-387).

Neither Hersh nor the superintendent were ever arrested or charged with criminal violations.

Regarding notice to Realty, Becker also stated that they, NYPD, sent a letter to Realty but never received an answer. Becker admitted however, that he never knew if the letter was sent (JA-379). He also testified that Detective Payne's letter was never returned but conceded that he didn't know if a call was made (JA-379).

On June 2, 1988, eight warrants were executed at the property resulting in 26 arrests. Some two weeks later drug dealing was still occurring at the property. Further, search warrants were obtained and executed on June 29, 1988 (SA-49,50). An in rem seizure warrant under 881(a)(7) was issued on June 24, 1988, and executed simultaneously with the NYPD raid on June 29, 1988; 15 apartments were sealed while the remaining 27 apartments continued to be tenanted as before except that the entire building had been seized by the Federal Marshal and the government became the new landlord. After seizure, security guards were obtained for the premises and paid for by the government.

Police Officer Richard LeGarda (Legarda) next testified to the extent that he entered the building in the summer of 1987

and saw crack viles on the floor (SA-92). Afterwards, he met the superintendent who said there was no problem with the building but said he would give Hersh LeGarda's card and Hersh would call him (JA-395). LeGarda testified that there was drug dealing going on in other buildings in the 600 block.

From summertime 1987 to seizure on June 29, 1988, LeGarda called Hersh twice and left one message to call back.

After the government put in its case for probable cause before the jury, the Court found that Plaintiff had proved probable cause.

Claimant's case

The Claimant, Realty, by Mark Hersh testified that he was a stockholder as well as managing agent of Realty. There were 43 apartments, seven on each floor and one in the basement. All had leases (the rent stabilized apartments) except for the rent controlled apartments which had statutory leases.

Hersh testified his father put him into the subject premises as managing agent in 1982. The superintendent Nahamias since 1976, was also his uncle through marriage. Nahamias lived at the building with his family until 1980 when he moved to Queens because of fear for his children's safety and neighborhood deterioration. Hersh testified that Nahamias collected rent, did basic repairs and that he, Hersh, did not go to tenant's apartments with any frequency—only when the tenant asked him in regarding a repair (JA-400).

Judge Conboy showed some incredulity concerning inability to enter apartments where an emergency existed and where Hersh indicated entry absent a legal proceeding for non-access could precipitate a tenant initiated lawsuit for illegal entry notwithstanding a legal right to do so (By example, please see New York Real Property Actions and Proceedings Law Section 853, Unlawful Detainer, Triple Damages).

Hersh further testified that over the period from 1982 to June 29, 1988, he had visited the building maybe a hundred times of the six or so years (some 16 times a year on average) (SA-124).

Hersh further testified that he learned about the police raid of June 2, 1988 from Nahamias who told him police came to the

building with guns and told Nahamias to stay in the basement and not come out. Upon coming out some hours later, he saw people lying on the floor having been arrested for selling drugs (SA-131, 132).

Upon learning this, Hersh instructed Nahamias not to accept rent from any of the arrested tenants (JA-405) and he called his attorney to find out what to do. Hersh testified that no one ever approached him offering to sell drugs (JA-407); he never received a letter from the police department concerning recourse to a "trespass program" (SA-132, 133); he never received a message from the police about a drug problem in the building (SA-150), and he first was alerted to a problem after he learned of the raid of June 2, 1988 (SA-151).

Sol Bruk, an attorney, testified as an expert in Landlord Tenant Law with specificity that prior to January 1989 when a Drug Part was established in the New York Housing Court, evictions for drug selling to be successful depended on an underlying conviction and were handled like any other eviction, accordingly taking an inordinate period of time to effect an eviction. Mr. Bruk testified that he thought little of a trespass action as a viable and effective way of dealing with drug related loitering problems.

Nahamias testified that after the June 29, 1988 police raid, he left the building.

Under the trial procedure in this forfeiture case, Plaintiff put on rebuttal witnesses, essentially, as follows: Marshal Donald Ward who supervised the federal in rem seizure of the entire building and sealed 15 leaseholds.

Justo Taval Rodriquez, who was convicted on October 6, 1988 of the sale and distribution of narcotics from apartments 64 and 51, testified that he was sentenced to seven years incarceration and eight years supervised release time (SA-298). He entered into a Cooperation Agreement with the United States for a reduction in sentence for his testimony at this trial.

Rodriquez further testified that Morris Nahamias was paid $250.00 not to bother people needing to go to apartments on drug related matters. He further stated that Nahamias would

receive fees for vacant apartments of between $2,000.00 and $3,000.00 to sell drugs from while they lived elsewhere.

Rebuttal witness Roberto Alexander, also a convicted felon, testified for the government after entering into a Cooperation Agreement and was to receive reduced jail time for such testimony against the Petitioner herein.

His testimony was similar to Rodriquez's as to the payment to Nahamias for undisturbed elevator use (SA-366) and further testified that Nahamias would not rent him an apartment for less than $4,000.00 to $8,000.00 per month.

The Charge

The Court stated that actual knowledge for a corporation is measured by the knowledge of its agents (JA-439) and that Hersh and Nahamias are agents and any actual knowledge possessed by or consent given by either is actual knowledge or consent of the corporation (JA-440). An agent's actual knowledge of drug violations can include whether they either deliberately ignored what was obvious to them, or facts which would have been known had agents not intentionally avoided learning the truth (JA-440).

The Court further defined the owners or agents duty once there is actual knowledge of illegal conduct: "[a]n owner has duty to do all that reasonably could be expected to prevent the illegal use of its premises." (JA-441, 442).

REASONS FOR GRANTING THE PETITION

A. THE INNOCENT OWNER DEFENSE UNDER 21 U.S.C. §881(a)(7) WAS DENUDED OF EFFICACY WHEN THE TRIAL COURT RULED IN A PRE-TRIAL MOTION IN LIMINE, THAT AS A MATTER OF LAW, AS AN AGENT OF THE CORPORATION, THE SUPERINTENDENT'S ALLEGED ILLEGAL ACTS WERE IMPUTED TO THE CORPORATION.

This petition presents the Court with an opportunity to address the issue as to the extent that an innocent owner is bound by its agent under the innocent owners' defense pursuant to 21 U.S.C. §881(a)(7), as well as the issue of whether a shareholder

in a corporation is entitled to an independent innocent owner's defense. As a result of the ruling of the District Court, a corporation may loose any meaningful right to claim innocence upon an *In Limine* motion imputing agency by a superintendent as a matter of law where an employee/superintendent, unknown to the corporation or its shareholders, permits real property to be utilized for distribution of illegal drugs.

In this case, a shareholder was denied the right to intervene as the District Court ruled that his rights were protected by a derivative shareholders suit against the Corporation and were not protected as an innocent owner under 21 U.S.C. §881(a)(7). (Appendix, pg.2a,3a). Thus, innocent share holders in a realty corporation stand to lose their entire investment interest without the opportunity to be heard, both because the corporation's innocence depends entirely upon the employee and because an individual shareholder is denied an independent innocent owner's defense.

In the case at bar, the District Court ruled in its Memorandum Endorsement of September 26, 1989 (Appendix, page 3a):

> "Finally, we grant the Government's in limine motion and hold as a matter of law that any knowledge of and consent to illegal activity on the premises established in defendant's employee Nahamias is attributable and imputable to the W. 141st Street Realty Corp."

Mr. Nahamias was the superintendent of the subject premises. As originally established in his Examination Before Trial, his job consisted of making minor repairs, advising his nephew by marriage, managing agent and stockholder Mark Hersh, of the need for more extensive repairs, collecting rent, signing standard leases and providing factual testimony as a witness on behalf of the Corporation (although not appearing in any corporate capacity).

The opening statements of the United States advised the jury of the pre-trial determination of Mr. Nahamias' agency (and extended it to Mark Hersh):

> "[b]ut there is no question that at least these two, Mark Hersh and Morris Nahamias, are agents of the corporation. That is, it has already been determined in pretrial

proceedings before today that whatever either one of them knew, the corporation knew, and whatever either one of them consented to, the corporation consented to. This is very important because in the course of the trial you will hear substantial testimony that at least Morris Nahamias knew and consented to the use of the building for the illegal sale of drugs." (SA-10, 11).

Essentially, two witnesses seeking reduction of their criminal charges by testifying in the within matter, testified that Mr. Nahamias took extra monies beyond the actual rents to permit the drug related activities in the building. (SA-299, 304-308, 359, 364-369). While such acts by Nahamias are not conceded herein, even if true *arguendo,* such acts should not have been imputed to the owner corporation as a matter of law, but should have been presented to the jury for such a determination.

It has been held that to determine if an act was within the scope of employment, the question must be resolved through State law. *Williams v. U.S.,* 350 U.S. 857 (1955). *Petrovsky v. U.S.,* 728 F.Supp. 890 (N.D.N.Y. 1990) citing *Williams.*

In *Riviello v. Waldron,* 47 N.Y.2d 297, 418 N.Y.S.2d 300, 391 N.E.2d 1278 (1979), the New York Court of Appeals held "[b]ecause the determination of whether a particular act was within the scope of the servant's employment is so heavily dependant on factual considerations, the question is ordinarily one for the jury." *Riviello,* 47 N.Y.2d at 300 citing *Rounds v. Delaware Lackawanna and Western Rail Road Co.,* 64 N.Y.129, 137-138; See *McLoughlin R.R.Co. v. N.Y. Edison Co.,* 252 N.Y. 202, 208 (1929); Note 45 U.of Cin.L.Rev. 235, 236. Under *Riviello* there are five factors to be reviewed to determine if an act was under the scope of employment (see also: *Petrovsky v. U.S.,* 728 F.Supp. 890 (N.D.N.Y. 1990), *Essig v. U.S.,* 675 F.Supp.84 (E.D.N.Y. 1987), Prosser, Torts [4th Ed.] §70, pg. 461, Restatement, Agency 2d §229).

The first factor is a connection between the time, place and occasion of the act. Here, concededly all known aspects of Nahamias' alleged acts occurred at the premises, although it is conceivable that other contact and agreements could have been made, if at all, off of the premises.

The second factor is the history of the relationship between employer and employee as spelled out in actual practice. While Nahamias was authorized to enter into written leases, the leases were standard form leases. Such leases uniformly prohibit any illegal use of the property and there is absolutely no evidence that Nahamias' alleged illegal acts, if true, were other than self-serving.

The third factor is whether the act is one commonly done by such an employee. Renting to drug dealers, adding extra illegal weekly charges to restore elevator service to facilitate drug purchases, and charging several thousand dollars above the legal rent to permit drug dealing is not the common practice of superintendents in similar positions.

The fourth factor is the extent of departure from normal methods of performance. For the same reasons as given in the third factor, the acts alleged to have been committed by Nahamias are a total departure from normal methods of performance for superintendents and unquestionably outside the scope of employment.

The fifth and last factor is whether the specific act was one that an employer could reasonbly anticipate. While one might reasonably expect a superintendent to commit certain "questionable acts" as one might normally expect of any other employee, it can not be reasonably anticipated that a superintendent would commit a criminal act or criminal acts to the degree alleged here.

Moreover, ratification of an unauthorized act must be predicated upon knowledge. Accordingly, if an employer's knowledge is partial or imperfect, such employer can not be said to have ratified the unauthorized act. *Re Smathers Estate,* 153 Misc.132, 274 N.Y.S. 717 (Surr. Ct., West. Co. 1937).

It should be noted that N.Y. Penal Law §20.20, entitled "Criminal liability of corporations" also requires that an agent act within the scope of his employment. Penal Law 20.20 provides in pertinent part:

> 1. As used in this section:
>
> (a) "Agent" means any director, officer or employee of a corporation, or any other person who is authorized to act in behalf of the corporation.

(b) "High managerial agent" means an officer of a corporation or any other agent in a position of comparable authority with respect to the formulation of corporate policy or the supervision in a managerial capacity of subordinate employees.

2. A corporation is guilty of an offense when: . . .

(b) The conduct constituting the offense is engaged in, authorized, solicited, requested, commanded, or recklessly tolerated by the board of directors or by a high managerial agent acting within the scope of his employment and in behalf of the corporation; or

(c) The conduct constituting the offense is engaged in by an agent of the corporation while acting within the scope of his employment and in behalf of the corporation, and the offense is (i) a misdemeanor or a violation, (ii) one defined by a statute which clearly indicates a legislative intent to impose such criminal liability on a corporation, . . ."

It is clear that Nahamias is not a high managerial agent under N.Y. Penal Law §20.20(1)(b) as he was the lowest level employee. He was neither acting, if the allegations of illegal acts are true, on behalf of the corporation nor within the scope of employment.

In sum, it appears that the Trial Court's ruling on agency imputing the allegations against Nahamias to the Corporation was error, and should have been a question for the jury.

Indeed, the United States Court of Appeals for the Second Circuit in its decision below indicates agreement:

> "Had Realty Corp. offered evidence to show that Realty Corp. did not share in Nahmias' alleged profits, we might view the matter differently." *U.S. v. 141st Realty Corporation,* 911 F.2d 870 at 876 (reproduced in Appendix pgs. 4a et seq.).

However, the Trial Court's ruling on the *In Limine* motion prejudged the offering of evidence of the Corporation's innocence and prevented as irrelevant the introduction of evidence that Mark Hersh and/or the other shareholders did not share in Nahamias' alleged profit. Indeed, the Government hid

the fact of Nahamias' alleged illegal acts until the very end of trial.

In the United States' brief in support of the *In Limine* motion, it was alleged that Nahamias was not acting adversely to the appellant. Prior to the time that the *In Limine* motion was decided, the United States knew of the cooperating drug dealers' testimony that showed such adverse interest. In essence Nahamias was determined to be an agent of the Corporation in part based upon normal acts of superintendents. The issue of Mark Hersh's innocence was thus ruled irrelevant. There was no point in introducing the absence of shared profit by the shareholders or the Corporation as the Trial Court had already ruled that it was enough if Nahamias acted illegally regardless whether the jury thought he acted for Corporation or not.

The Trial Court's instructions to the jury on this issue was:

> "In this case, Mark Hersh and Morris Nahmias are agents of the West 141st Street Realty Corporation. Therefore, any actual knowledge possessed by or consent given by Mark Hersh and Morris Nahamias is actual knowledge possessed by the Corporation or consent given by the Corporation." (SA-490).

There was no reason to have Hersh testify again after the testimony of the surprise criminal rebuttal witnesses. According to the *In Limine* decision, Hersh's testimony was irrelevant to the issue of knowledge—it was obvious from the testimony and from the Government's opening statement that the only allegations of wrong doing by an agent would be made against Nahamias. The jury was to be instructed in essence that Hersh's innocence was irrelevant if Nahamias was "guilty" of wrong doing. Quite likely, the possibility of Nahamias' involvement with drug dealing in the building was only discovered by Hersh in the last minutes of the Government's rebuttal case. There was no viable opportunity to return Hersh to the stand to testify regarding not sharing in any alleged profits as the Court had already determined that the rebuttal case would conclude the trial. (SA-6). Indeed, where the substance of objection to introduction of evidence has been thoroughly explored during a

hearing or motion *In Limine,* and Trial Court's ruling regarding introduction of evidence was explicit and definitive, no further acts are required to preserve the issue on appeal. *Palmerin v. Riverdale,* 794 F.2d 1409 (CA9 Cal. 1986).

21 U.S.C. §881(a)(7) provides:

> "All real property, including any right, title and interest (including any leasehold interest) in the whole of any lot or tract of land and any appurtenances or improvements, which is used, or intended to be used, in any manner or part, to commit, or to facilitate the commission of, a violation of this title punishable by more than one year's imprisonment, except that no property shall be forfeited under this paragraph, to the extent of an interest of an owner, by reason of any act or ommission established by that owner to have been committed or ommitted without the knowledge or consent of that owner."

Under the statute, the Corporation was clearly entitled to enter evidence that any act or ommission of its employee Nahamias was committed or ommitted without the knowledge of the Corporation. Yet even before trial commenced, the Court ruling *In Limine* effectively translated to mean that the innocent owner's defense was not available. Under these circumstances it did not matter if the Corporation or any of its shareholders profited from Nahamias' alleged illegal acts. It is respectfully requested that this Court note in passing that neither Nahamias nor especially Mark Hersh were ever charged with any criminal wrong doing at the premises.

As a corrolary to the agency arguement, the Trial Court held that "[a]s a mere shareholder, Weg has no standing to intervene herein". (Appendix, pg.2). The Trial Court, by endorsing the Government's Memorandum, concured that Mr. Weg's relief was to bring a shareholder's derivative action. Such relief would of necessity be illusory as most apartment buildings are held in a corporate capacity, with the sole asset of the corporation being the property itself which was forfeited *in toto* by the judgment herein, leaving an empty and worthless corporate shell.

A judgment by shareholders Weg, Mark Hersh or George Hersh against the Corporation would be uncollectable as the sole asset of the Corporation was the subject premises. It is ultimately the individual shareholders, who chose to insulate their liability by utilization of the legal fiction of a corporation, who would be denuded of the innocent owner's defense if an *In Limine* motion were be allowed to control the issue of agency as it was in the instant case. Whether such striking of the right to that defense is viewed as through a corporate defense or through an individual owner's defense, the result is the same: The inocent owner's defense under the U.S. Constitution as espoused under *Calero Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663 (1974), and the somewhat different defense under the statutory scheme of 21 U.S.C. §881(a)(7), has been breached.

Indeed, Assistant United States Attorney Dempsey appears to agree in her statement in her opposition to Mr. Weg's intervention motion:

> "Mr. Weg's proposed intervention in this action at this late date is untimely in the extreme and would unnecessarily complicate this case, which has been fully prepared for trial since January, 1989. (Appendix, pg. 2a footnote)

The assets of an individual that could amount to well over $100,000.00 should not tritely be dismissed by the Government merely because it "complicates this case." Perhaps the actual fear was that evidence of innocence would move the jury. It was this very right to show innocence that Petitioner and the other shareholders were denied.

It is respectfully requested that this Court hold that the right to the various forms of the innocent owner's defense under *Calero* and 21 U.S.C. §881(a)(7) were denied by the Trial Court under both the Constitution of the United States and as provided under statute. Imperiled by the Trial Court's reasoning are the innumerable shareholders and honest citizens of the United States who are potential innocent victims to an unscrupulous employee and the seemingly limitless supply of drug money.

Lured by the promise of wealth, it would be unlikely that the employee would advise the employer of the source of his illegal wealth or of its very existence. Not a thought would be given the damage to the employer/investors/shareholders by the forfeiture of the property. Protection of those innocent owners was, however, envisioned by both our Constitution and by 21 U.S.C. §881(a)(7).

B. THE TRIAL COURT'S RULING *IN LIMINE* AND THE TRIAL COURT'S DEPARTURE IN ITS CHARGES TO THE JURY FROM CLEAR STATUTORY LANGUAGE TO A CONSTITUTIONAL INTERPRETATION FOR A DIFFERENT FORFEITURE STATUTE SO CHANGED THE PROOF REQUIRED THAT PETITIONER WAS DENIED A FAIR TRIAL.

As discussed in Reason A, the *In Limine* ruling before trial determining that the Superintendant was the agent of the Corporation as a matter of law, precluded the introduction of any evidence that would show that the Corporation or its shareholders either didn't know of the drug dealing, or didn't consent to such dealing. Indeed, the Charges of the Trial Court took that issue away from the jury.

In essence, after trial the jury should have deliberated upon the following questions:

1. Did Nahamias (the Superintendant) know of the drug dealing?
2. Did Nahamias consent to that drug dealing?
3. Was Nahamias acting for the Corporation?
4. Was Nahamias's knowledge communicated to the Corporation (Mark Hersh)?
5. Did the Corporation know of the drug dealing?
6. Did the Corporation consent to the drug dealing?

To sustain a determination for the Government, without the *In Limine* determination, the jury would have to answer "yes" to the following sets of questions: one,

two and three; or one, four and six; or five and six; or five, two and three. In light of the *In Limine* ruling, the jury had to answer "yes" to merely questions one and two, with the burden of proof remaining with the claimant to obtain a "no" determination.

Nor, respectfully, did the Trial Court's misapplication of the law end here. The Court further instructed the jury:

"I instruct you that once an owner or his agent is on actual notice of illegal conduct involving the owner's leased property the owner has a duty to do all that reasonably could be expected to prevent the illegal use of its premisses." (SA-493).

In *Calero Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663 (1974) it was held that under the U.S. Constitution, an innocent owner may raise a defense which includes proof that the owner did all that could reasonably be expected to prevent the illegal use alleged. *Calero* was decided prior to the enactment of 21 U.S.C. §881(a)(7) and involved a statute that did not contain its own innocent owner defense.

Under §881(a)(7), relating only to the forfeiture of real property, the innocent owner defense has been added with statutory language differing from the language interpreted by this Court under *Calero*:

"[n]o property shall be forfeited ... to the extent of an interest of an owner, by reason of any act or ommission established by that owner to have been committed or ommited without the knowledge *OR* consent of that owner." 21 U.S.C. §881(a)(7)*(Emphasis Supplied)*.

Thus, contrary to the Charges of the Trial Court here, it has been held that there is no requirement that an owner show that he did everything possible to prevent the proscribed use of the property. *U.S. v. Parcel Known as 6109 Grubb Road*, 866 F.2d 618 (3rd Cir. 1989), *U.S. v. Lots 12, 13, 14, 15, and 16, etc.*, 869 F.2d 942 (6th Cir. 1989). (See also: *U.S. v. Premises*

Known as 171-02 Liberty Avenue, 710 F. Supp. 46 (E.D.N.Y. 1989) and *U.S. v. One 1981 Datsun 280ZX*, 644 F. Supp. 1280 (E.D.Pa. 1986).

The Trial Court had added to the burden of proof. To prevail, not only was the burden on the Claimants to prove the lack of knowledge and consent of the Superintendant, but now they were also required to prove that they did all that they could to prevent drug use. By such altering of the proof requirements, Claimants were denied due process and a fair trial. This absence of a fair trial was compounded by allowing suprise rebuttal witnesses to testify to alleged illegal acts by Nahamias that were contrary to the ruling of the *In Limine* motion by the Government.

The Legislature, by enacting different language regarding the innocent owner defense in real property forfeiture intended a different standard of proof and care in real property situations vis-a-vis personal property situations similar to *Calero*. It is respectfully requested that this Court interpret the standard that applies so that such standard does not vary from court to court or judge to judge.

C. PRESEIZURE OF THE APARTMENT BUILDING BY EX PARTE APPLICATION WITHOUT NOTICE PURSUANT TO 21 U.S.C. 881 (a)(7) VIOLATED PETITIONER'S CONSTITUTIONAL RIGHT TO DUE PROCESS OF LAW (U.S. CONSTITUTION, FIFTH AMENDMENT)

In this case the ex parte preseizure, without notice, of real property presents a circumstance unique in the short but rapidly expanding history of 21 U.S.C. 881 (a)(7). Involved is not a "home" with its particular rights of privacy vis-a-vis seizure as recently discussed in *U.S. v. Property at 4492 S. Livonia Road, Livonia, New York* , 889 F.2d 1258 (2nd Cir. 1989), but rather a large residential 43 unit apartment building whose operation by its very nature is more diversified and complex than a *Livonia,* type situation, but not that different. The Court in *Livonia* held the seizure of a house used to facilitate felony narcotics violations pursuant to a warrant issued *ex parte* without notice by a magistrate is a deprivation of property without due process.

Court's have long espoused the Constitutional protections of the Fifth Amendment: "[n]o person ... shall be deprived of liberty or property without due process of law." that requires notice and an opportunity to be heard before deprivation of a property interest, *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306 (1950) provided that such hearing is meaningful as to time and manner. *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965). Accordingly, a meaningful hearing means that it is accomplished before seizure of the property, *Matthew v. Eldridge*, 424 U.S. 319 (1976). Only the existance of exigent circumstances would obviate the need for notice and hearing. *Boddie v. Connecticut*, 401 U.S. 371, 379 (1971)

Criteria for ex-parte preseizure without notice before a magistrate is enunciated in *Matthews v. Eldridge*, 424 U.S. 319, (1976), as follows: (1) the significance of the private interest involved; (2) the risk of the erroneous deprivation of that interest through the procedures used and the probable value of additional procedural safeguards; and (3) the government's interest in pre-notice seizure, including the avoidance of burdensome additional procedures.

The Court below in this case moved to distinguish the private interests involved by depicting the long recognized special right of privacy of one's home as against the ownership and possession of a residential apartment building. The Court in *U.S. V. 141st Street Corp. By Hersh*, 911 F2d 870 (2d Circuit) cited *New York v. Burger*, 482 U.S. 691, 700 saying that "An expectation of privacy in commercial premises...is different from and indeed less than a similar expectation in an individual's home." But *Burger, supra* involved a governmental instrusion into a "junkyard" wherein were found stolen cars and parts.

In that case, search and *seizure* were understandable especially where personal property was involved which could be easily moved out of the jurisdiction. Not so here for here real property, albeit, immovable property is involved. Certainly, a residential piece of real property is not a kindred spirit of commercial property as was the junkyard in *B urger, supra.* Residential realty in New York is subject to widely divergent and different treatments than is commercial real estate, i.e., rent

controls (Stabilization and Rent Control), taxation, tenants' rights, non-harrassment rights of tenants and a whole panoply of other rights indigenous to a non-commercial relationship. Thus, it is less that commercial. Petitioner submits to this court that even as the Court in *141st Street Corp., supra* said that a commercial interest is not insubstantial, a residential apartment building is not a commercial interest and must be more substantial from the point of view of expectation of privacy.

In regard to the second criteria under *Matthews, supra*, although an ex-parte preseizure probable cause determination before a magistrate would reduce the possibility of an erroneous deprivation, preseizure notice and an opportunity to be heard would further minimize that risk.

Finally, the third criteria, the government's interest is somewhat myopic in seizing an immovable piece of realty where they have already eliminated the preceived ill, to wit, search and seizure warrants were executed on June 2, 1988 and on June 29, 1988 respectively. Simultaneous utilization of ex-parte in rem preseizure warrant absent notice under 21 U.S.C. §881 (a)(7) in conjunction with the execution of search warrants does not subsequently implemented after an adversary proceeding. Indeed, the mere filing of a notice of pendency against the realty would destroy the property's marketability.

Only if exigent circumstances were shown to exist could the government overcome the Due Process violation of the Fifth Amendment. Here, the res is a seven story apartment building which is incapable of mobility such as would otherwise be the case involving a boat, *Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663, 679 (1974).

Petitioner would raise one last issue regarding the latitude of "forfeitablness" being imposed through the medium of 21 U.S.C. 881 (a)(7). The statute is being construed as unlimited in its appetite to devour claimants' estates -- as the Court in *Livonia* said, "For example, if drugs were sold in a shed on the King Ranch (and of course we do not suggest that they are) would its approximately 800,000 acrs be lost?" It went on to say, "At some point, it seems that forfeiture would cross the line of condeming an instrumentality of crime and move into the area of punishing a defendant by depriving him of his estate."

(Please see the plight of the shareholder intervenor in this case who may lose his estate without being permitted to extricate his investment interest from the insatiable maw of 881 (a)(7). Petitioner would also plead in fairmess that any forfeiture, be limited to the 15 leasehold apartments and in no case to the entire real property).

Accordingly, it is submitted that the preseizure ex parte warrant without notice executed under 21 U.S.C. 881 (a)(7) was violative of Due Process and did nothing more than to deprive the Petitioner of his property rights when the government's interest would have been protected after an adversary hearing in which the Petitioner would have been able to assert the innocent owner defense immediately.

CONCLUSION

It is respectfully submitted that Petitioner's petition for certiorari should be granted and that the issues raised therein should be addressed by the justices of this Court.

Dated: November 12, 1990
New York, New York

Respectfully submitted,

SANFORD H. GROHMAN
JEFFREY B. GROHMAN*
GROHMAN & GROHMAN
Attorneys for Petitioner
200 Park Avenue, Suite 303 East
New York, New York 10166
(212) 986-2515

**Counsel of Record*

APPENDIX

JUDGMENT

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA,

Plaintiff,

-against-

ALL RIGHT, TITLE AND INTEREST IN REAL PROPERTY KNOWN AS 617 WEST 141st STREET, NEW YORK, NEW YORK,

Defendant-in-rem,

A Jury Trial before the Honorable KENNETH CONBOY, U.S.D.J., having begun on October 31, 1989, and at the conclusion of the trial the jury having answered the attached "General Verdict Form," and the jury in so doing having returned a verdict in favor of the plaintiff, it is,

ORDERED, ADJUDGED AND DECREED: That judgment be entered in favor the plaintiff and that the land and building located at 617 West 141st Street, New York, New York, is hereby forfeited to the United States Government.

DATED: NEW YORK, NEW YORK
November 8, 1989

s/ Raymond F. Burg
Clerk

APPROVED:
s/ Kenneth Conboy
U.S.D.J.

THIS DOCUMENT WAS ENTERED ON THE DOCKET ON 11-13-89

MEMORANDUM ENDORSED

(Letterhed of United States Attorney Southern Districe of New York)

August 1, 1989

Honorable Kenneth Conboy
United States District Court
United States Courthouse
Room 2904
Foley Square
New York, New York 10007

Re: *U.S. v. 617 West 141st Street, New York, New York*

Dear Judge Conboy:

Last week we received a copy of a letter to this Court dated July 21, 1989 from Sanford Grohman, counsel for Stanley Weg, who purports to hold a 10% stock interest in West 141st St. Realty Corp. The corporation owns 617 W. 141st St., New York, New York, a building seized for civil forfeiture by the Government in the above action.

The Government objects to Mr. Weg's untimely and improper attempt to intervene in this matter. As you are aware, West 141st St. Realty Corp. filed a claim to the property shortly after it was seized and has as all times been reprsented by Nathan Ferst. It seems to us that *Mr. Weg, as a mere shareholder, does not have standing to intervene here.* If Mr. Weg is dissatisfied with the management of the corporation, or the way in which they have litigated this matter, his remedy is against them. If Mr. Weg is dissatisfied with the representation of the corporation, that is something that should be handled between Mr. Weg, counsel for the corporation and the other owners. Intervention by a shareholder is simply not appropriate in this action in which the building is claimed by the corporation

and where the Government does not seek to forfeit Mr. Weg's shares in the corporation. (In any event, the corporation has never been abel to produce even one document indicating that Mr. Weg owns any part of the corporation.)*

---

*Footnote: the remainder of the letter contains the following passage:

Mr. Weg's proposed intervention in this action at this late date is untimely in the extreme and would unnecessarily complicate this case, which has been fully prepared for trial since January 1989.

Respectfully,
BENITO ROMANO
United States Attorney
By:_____
PAMELA L. DEMPSEY
Assistant United States Attorney
Tel. No. (212(791-1312

cc: Nathan Ferst, Esq.
Sanford H. Grohman

MEMORANDUM ENDORSEMENT

KENNETH CONBOY, District Judge:

United States of America v. 617 West 141st Street Corp., New York, New York, 88 CIV 4708 (KC)

The Court will treat the July 21, 1989 letter of Sanford H. Grohman, counsel for Stanley Weg, as a motion to intervene in this action, pursuant to Rule 24, F.R.Civ.P., and the letter of the Government dated August 1, 1989 as a motion opposing intervention. Upon due consideration, and for reasons set forth by the Government, the motion is denied as not being timely, since this case is in excess of one year old and is on the Court's ready trial calendar, with a final pre-trial order entered. We note that on the basis of the affirmation submitted by Nathan M. Ferst, dated September 19, 1989, the Court rejects the afidavit of Stanley Weg, dated September 18, 1989, as untrustworthy. Furthermore, as a mere shareholder, Weg has no standing to intervene herein. Finally, we grant the Government's in limine motion and hold as a matter of law that any knowledge of and consent to illegal activity on the premises established in defendant's employee Nahmias is attributable and imputable to the W. 141st Street Realty Corp.

SO ORDERED.

Dated: New York, New York
September 26, 1989

KENNETH CONBOY
United States Districe Judge

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 1195—August Term, 1989

(Argued April 20, 1990 Decided August 17, 1990)

Docket No. 89-6268

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

—v.—

141ST STREET CORPORATION, by MARK HERSH, Managing Agent of the defendant in Rem,

Appellant,

ALL RIGHT, TITLE AND INTEREST IN REAL PROPERTY AND BUILDINGS KNOWN AS 617 WEST 141ST STREET,

Defendant.

Before:

TIMBERS, MESKILL and PIERCE,

Circuit Judges.

Appeal from a judgment entered in the United States District Court for the Southern District of New York,

Conboy, *J.*, ordering forfeiture pursuant to 21 U.S.C. § 881(a)(7) of an apartment building used for the distribution of narcotics.

Affirmed.

MESKILL, *Circuit Judge*:

This appeal presents several questions, both constitutional and statutory, that arise from the forfeiture of an apartment building used to facilitate narcotics distribution. The government seized the building in question after obtaining a warrant through an *ex parte* application to a magistrate, and then instituted this civil forfeiture action under 21 U.S.C. § 881(a)(7).[1] The forfeiture

1 Section 881 provides in pertinent part:

(a) Subject property

The following shall be subject to forfeiture to the United States and no property right shall exist in them:

. . . .

action was tried in the United States District Court for the Southern District of New York before Conboy, *J.*, and a jury. The jury returned a verdict in favor of the government, and the owner of the building, West 141st St. Realty Corporation (Realty Corp.), appeals. For the reasons set forth below, we affirm.

BACKGROUND

The Property and the Evidence of Drug Activity

The forfeited property is a six story building with forty-one apartments, located at 617 West 141st Street in Manhattan. Realty Corp. is the record owner of the building. Mark Hersh, the president and principal stockholder of Realty Corp., is the building's managing agent. Hersh's uncle, Morris Nahmias, is the superintendent of the building, although he performs many functions generally associated with a managing agent such as entering into leases and collecting rent.

The testimony at trial established that, from December 1986 through May 1988, the New York City police received complaints of narcotics trafficking in twenty-four of the forty-one apartments in the building. Apart-

---

(7) All real property, including any right, title, and interest (including any leasehold interest) in the whole of any lot or tract of land and any appurtenances or improvements, which is used, or intended to be used, in any manner or part, to commit, or to facilitate the commission of, a violation of this subchapter punishable by more than one year's imprisonment, except that no property shall be forfeited under this paragraph, to the extent of an interest of an owner, by reason of any act or omission established by that owner to have been committed or omitted without the knowledge or consent of that owner.

21 U.S.C. § 881(a)(7).

ments on all six floors of the building were the subjects of complaints. The common areas of the building were littered with crack vials and with broken pipes designed for smoking crack, and lookouts constantly were posted both in front of the building and along the block where it is located. In addition, several "steerers," those who direct potential drug customers to the place where the drugs are located, were repeatedly observed loitering outside the building and in the lobby.

Officer Richard Lagarda of the New York City police testified that he spoke with Morris Nahmias three times during the summer of 1987 regarding the drug problem at the building. Lagarda asked that Mark Hersh contact him to see what could be done about the drug activity. Lagarda also attempted to telephone Hersh directly on two occasions, each time leaving a message, but Hersh never returned his calls. Officer Victor Mendoza similarly testified that he sent a letter to Mark Hersh in July 1987 asking that he come to the police precinct to discuss narcotics trafficking at the building, but that Hersh never responded. Officer Mendoza and his partner each telephoned Hersh on three occasions and left messages, but never heard from him. Hersh testified that he received no messages from the police.

In May 1988, Lieutenant Kenneth Becker of the New York City police took charge of an investigation into the narcotics sales in the building. Given the level of drug activity in the building and Hersh's failure to respond to previous inquiries by the police, Lieutenant Becker chose not to contact Hersh regarding the drug activity because he felt that "the owner was possibly aware of [the narcotics trafficking], if not working directly with the narcotic traffickers in th[e] building." Under Lieutenant

Becker's direction, undercover police officers purchased narcotics in various apartments. The officers discovered that an alarm system, the purpose of which was to alert the occupants of apartments to police presence, was wired from a central connection box on the roof of the building into the apartments searched. Based on the knowledge gained through these purchases, search warrants were issued for eight apartments. These warrants were executed on June 2, 1988. The police arrested twenty-six people and recovered drugs, weapons and cash.

Approximately two weeks later, undercover officers purchased narcotics in nine additional apartments and, based on these purchases, obtained search warrants for these nine units. The officers also obtained a seizure warrant for the entire building by applying *ex parte* to a United States Magistrate as authorized by 21 U.S.C. § 881(b). The seizure warrant ordered the United States Marshal to take control of the premises and the leasehold interest of fifteen tenants within the building.

The government executed the search and seizure warrants on June 29, 1988, recovering more contraband and arresting twelve people. Pursuant to the seizure warrant, the officers sealed the fifteen apartments and evicted the occupants. The federal government entered into occupancy agreements with the residents of the remaining units.

Proceedings in the District Court

The government filed a complaint seeking forfeiture of the building pursuant to 21 U.S.C. § 881(a)(7) on July 7, 1988. Shortly thereafter, Realty Corp. filed a claim to the building and asserted the "innocent owner"

defense recognized by section 881(a)(7). The district court ruled prior to trial that, as a matter of law, any knowledge of or consent to illegal activity in the building by Morris Nahmias was imputed to Realty Corp. because Nahmias acted as an agent of the corporation. The court also determined that the government had met its initial burden of establishing probable cause to believe that the building was used to facilitate felony violations of the federal narcotics laws. *See* 21 U.S.C. § 881(d); 19 U.S.C. § 1615. Thus, the only issue submitted to the jury was whether the building should not be forfeited because the narcotics trafficking took place "without the knowledge or consent" of Realty Corp. *See* 21 U.S.C. § 881(a)(7). The jury returned a verdict in favor of the government, and Realty Corp. appeals.

DISCUSSION

Realty Corp. argues that the judgment of forfeiture should be vacated for four reasons: (1) section 881(a)(7) is unconstitutional as applied because seizure of the building without prior notice is a deprivation of property without due process of law; (2) the district court misapplied the innocent owner defense by ruling that Nahmias' knowledge of narcotics activity was imputed to Realty Corp. and by giving erroneous jury instructions; (3) forfeiture of the entire building is not permitted by section 881(a)(7) and violates the Eighth Amendment because only certain apartments were involved in narcotics distribution; and (4) the district court's conduct deprived Realty Corp. of a fair trial. We find none of these claims persuasive.

A. *Due Process*

Realty Corp. does not contend that 21 U.S.C. § 881 is unconstitutional on its face. Rather, Realty Corp. asserts that the statute as applied in this case—seizure pursuant to a warrant obtained by *ex parte* application to a magistrate as authorized by 21 U.S.C. § 881(b) and Fed. R. Crim. P. 41—violates the Due Process Clause of the Fifth Amendment. There is no question that Realty Corp. had a protected property interest in the forfeited building and that the seizure in and of itself was a deprivation of that property. The questions before us are what process was due and whether that process was accorded Realty Corp.

As a general rule, due process requires that the government give notice and an opportunity to be heard *before* taking an individual's liberty or property. *See, e.g., Zinermon* v. *Burch*, 110 S.Ct. 975, 984 (1990); *Boddie* v. *Connecticut*, 401 U.S. 371, 378-79 (1971). In some situations, however, "an important government interest, accompanied by a substantial assurance that the deprivation is not baseless or unwarranted may justify postponing the opportunity to be heard until after the initial deprivation." *Strong* v. *Board of Educ.*, 902 F.2d 208, 212 (2d Cir. 1990). We conclude that the present case is one of these situations.

Realty Corp. relies primarily on *United States* v. *Premises and Real Property at 4492 South Livonia Road, Livonia New York*, 889 F.2d 1258 (2d Cir. 1989), *reh'g denied*, 897 F.2d 659 (1990) (per curiam). In *Livonia Road*, we held that seizure of a home used to facilitate felony narcotics violations pursuant to a warrant issued *ex parte* by a magistrate is a deprivation of property without due process. *Id.* at 1265. To reach this

result, we balanced the three factors articulated in *Mathews* v. *Eldridge*, 424 U.S. 319, 335 (1976), *i.e.*, the private interest involved; the risk of an erroneous deprivation of that interest through the procedures used and the probable value of additional procedural safeguards; and the government's interest, including the burden that additional procedural requirements would have. 889 F.2d at 1264-65. *Livonia Road* is distinguishable, however, because the balance of factors in this case favors seizure with no prior notice to the owner.

The private interest at stake in *Livonia Road* was the claimant's freedom from governmental intrusion in his home, an interest that has long been recognized to "merit[ ] special constitutional protection." 889 F.2d at 1264; *see Silverman* v. *United States*, 365 U.S. 505, 511 (1961). In contrast, the private interest involved here is ownership and possession of an apartment building solely for commercial purposes. *See, e.g., New York* v. *Burger*, 482 U.S. 691, 700 (1987) ("An expectation of privacy in commercial premises . . . is different from, and indeed less than, a similar expectation in an individual's home."). The owners of the leasehold interests in the building arguably have the same interest as the homeowner in *Livonia Road*, but none of the evicted "tenants" of the seized apartments have filed a claim in this action. The only claimant is Realty Corp. We do not mean to suggest that a commercial interest is insubstantial, merely that in the eyes of the law it traditionally has not occupied the same privileged place as the home.

The procedure employed to seize the building also afforded Realty Corp. some measure of protection from an erroneous deprivation of property. This *Mathews*

factor is essentially the same here as in *Livonia Road*, where we noted that "an ex parte probable cause determination before a judicial officer reduces the possibility of an erroneous deprivation, [although] preseizure notice and an opportunity to be heard would certainly further minimize that risk." 889 F.2d at 1265.

The government's interest, on its face, also is the same as in *Livonia Road*. It is "the narrow [interest] of obtaining pre-notice seizure of a fixed item like a home, not the broad interest of enforcing the drug laws, since the latter will also be served by forfeiture after an adversary proceeding." *Id.* However, "[i]n assessing the strength of the government's interest, we must determine whether this case presented exigent circumstances warranting the postponement of notice and the opportunity for an adversarial hearing." *Id.*

To find that "exigent" or "extraordinary" circumstances are present, we must conclude that (1) seizure was necessary to secure an important governmental or public interest, (2) very prompt action was necessary, and (3) a government official initiated the seizure by applying the standards of a narrowly drawn statute. *Fuentes* v. *Shevin*, 407 U.S. 67, 91 (1972). We are satisfied that all three conditions have been met. First, the residents of the neighborhood where the building is located have an interest in being free from the dangers presented by a large scale narcotics operation. Similarly, the government has an interest in enforcing its drug laws. Second, there was a great need in this case for prompt action. The record indicates that narcotics trafficking was rampant in the building and in the areas immediately surrounding it. Execution of search warrants and arrests of those involved in the trafficking had

proved ineffective in halting further criminal activity. In fact, only two weeks after law enforcement officers searched eight apartments and arrested twenty-six people, they were able to purchase drugs in nine additional apartments in the building. This high level of continued drug activity presented an obvious danger to the community. In addition, the police suspected from Mark Hersh's failure to respond to several attempts to contact him that he was aware of the drug activity and possibly involved in it. In this situation, prior notice of the seizure might have hampered efforts to enforce the narcotics laws and increased the risk to police and the community from the seizure. Thus, unlike *Livonia Road*, in which "the government could not reasonably have feared that the property would be 'further used as an instrumentality of crime,' " 889 F.2d at 1265 (quoting district court opinion), this case presented a clear need for prompt action. Finally, the warrant was issued by a magistrate, who applied the well defined standard of probable cause to believe that the premises were used or intended to be used to facilitate felony violations of the federal narcotics laws. *See* 21 U.S.C. § 881(b); Fed. R. Crim. P. 41.

We realize that seizure of an entire building with no prior notice to the owner is, to say the least, a deprivation of a significant property interest. But "[t]he government should be able to act to advance important public interests even though it deprives someone of property or liberty without a prior hearing, so long as adequate post-deprivation process provides the individual with a safeguard against arbitrary governmental actions." J. Nowak, R. Rotunda & J. Young, *Constitutional Law* 560 (2d ed. 1983) (footnote omitted). The high level of ongoing narcotics trafficking in the build-

ing, coupled with Realty Corp.'s opportunity to contest the forfeiture at trial lead us to conclude that issuance of the seizure warrant by a neutral and detached magistrate was all the process that was due. *See Calero-Toledo* v. *Pearson Yacht Leasing Co.*, 416 U.S. 663, 676-80 (1974) (upholding seizure of yacht with no prior notice in part because seizure prevented further illicit use of the property).

B. *The Innocent Owner Defense*

As noted above, the district court ruled as a matter of law that the government had met its initial burden under section 881(a)(7) of establishing probable cause to believe that the building was used to facilitate narcotics distribution. The burden thus shifted to Realty Corp. to prove either that the building was not used as alleged or that the drug activity took place without its knowledge or consent. *See, e.g., United States* v. *All Right, Title & Interest in Real Property & Building Known as 303 West 116th Street, New York, New York*, 901 F.2d 288, 290-91 (2d Cir. 1990); *United States* v. *Premises Known as 3639-2nd St., N.E., Minneapolis, Minnesota*, 869 F.2d 1093, 1095 (8th Cir. 1989). Realty Corp. does not contest that the drug activity took place, but asserts the "innocent owner" defense. Realty Corp. contends that the district court erred in (1) ruling as a matter of law that Morris Nahmias' knowledge was imputed to Realty Corp., and (2) instructing the jury that Realty Corp. could not establish the innocent owner defense unless it proved that it had done all that could reasonably be expected to prevent the narcotics trafficking.

1. *Agency*

Government witnesses testified at trial that Nahmias accepted bribes from drug dealers to keep the elevators in the building running, and that he charged several thousand dollars per month to lease apartments specifically for drug dealing purposes. Based on this evidence, Realty Corp. claims that Nahmias was acting adversely to it when he accepted the bribes and charged exorbitant rents, and therefore any knowledge that Nahmias may have had of the narcotics trafficking cannot be imputed to the corporation.[2]

Realty Corp. is correct that, as a general rule, the knowledge of an agent who acts adversely to his principal is not imputed to the principal on the theory that the agent has no incentive to inform the principal of his knowledge. *See, e.g., Index Fund, Inc.* v. *Hagopian*, 609 F.Supp. 499, 507-08 (S.D.N.Y. 1985); *Marine Midland Bank* v. *John E. Russo Produce Co.*, 50 N.Y.2d 31, 40-41, 405 N.E.2d 205, 211-12, 427 N.Y.S.2d 961, 968 (1980). Realty Corp.'s argument is unpersuasive, however, because Nahmias' actions were adverse to the corporation only in the sense that his actions contributed to the imputation of knowledge to Realty Corp. Had Realty Corp. offered evidence to show that Realty Corp. did not share in Nahmias' alleged profits, we might view the matter differently. But Realty Corp., which had the burden of disproving knowledge, did not introduce any evidence on this issue. We must reject Realty Corp.'s argument because, followed to its logical

---

2 Realty Corp. also claims that the evidence does not support the district court's determination that Nahmias was an agent of the corporation. This argument is plainly without merit. The record indicates that Nahmias routinely performed such functions as entering into leases and collecting rents.

extreme, it would mean that a corporation's property would never be subject to forfeiture because the very actions of the agent that cause an imputation of knowledge are "adverse" to the principal.

In addition, Realty Corp. does not dispute that Mark Hersh's knowledge is chargeable to the corporation, and there was substantial evidence from which the jury could have concluded that Hersh was aware of the drug trafficking. At least three police officers attempted to contact Hersh several times at Realty Corp.'s offices. When the officers telephoned Hersh, they always left messages stating the reason for their call. Further, a tenant in the building, Jose Vasquez, testified that he spoke with Hersh directly on the telephone and complained about the drug dealers on his floor. Finally, Hersh himself admitted visiting the building, which was a veritable anthill of drug activity, on approximately one hundred occasions and speaking with Nahmias about the building on a weekly basis. On these facts, the jury was entitled to conclude that Hersh knew of the narcotics activity. *Cf. United States* v. *One Parcel of Property Located at 15 Black Ledge Drive, Marlborough, Connecticut*, 897 F.2d 97, 102 (2d Cir. 1990) (upholding summary judgment for government when drug activity was readily apparent despite claimant's contention that she had no knowledge of husband's drug activity because "on these facts . . . such a bare denial [of knowledge] was insufficient to create a genuine triable issue").

2. *Jury Instructions*

The district court instructed the jury that, for Realty Corp. to establish its innocent owner defense, the corporation had to prove either that it did not know of the

drug activity or that it did not consent to it. The court stated:

> [T]he corporation must prove *either* that it did not know of *or* consent to the use of its property to commit or facilitate the commission of felony violations of the drug laws. . . .
>
> . . . .
>
> . . . The claimant . . . bears the burden of demonstrating by a preponderance of evidence *either* that it had no actual knowledge *or* had not given its consent to the use of its property to facilitate a drug transaction.

(emphasis added). The court further instructed the jury that

> once an owner or his agent is on actual notice of illegal conduct involving the owner's leased property the owner has a duty to do all that reasonably could be expected to prevent the illegal use of its premises.
>
> It is for you to decide using your common sense what actions would have comprised a reasonable response by a landlord in similar circumstances.

We interpret the district court's instructions to mean that, once an owner has knowledge, he gives his consent to the narcotics activity *unless* he then does all that reasonably could be expected to prevent further illicit use of the premises. Realty Corp. maintains that this definition of consent is erroneous. We disagree.

a. *Absence of Consent as a Defense*

The first question that we must address is whether the district court properly instructed the jury that Realty

Corp. could succeed on its defense by establishing either lack of knowledge or lack of consent. Some courts have held that, in order to maintain the innocent owner defense, a claimant must establish *both* lack of knowledge *and* lack of consent. *See United States* v. *One Parcel of Land, Known as Lot 111-B, Tax Map Key 4-4-03-71(4), Waipouli, Kapaa, Island and County of Kauai, State of Hawaii*, 902 F.2d 1443, 1445 (9th Cir. 1990) (per curiam); *United States* v. *Certain Real Property and Premises Known as 418 57th Street, Brooklyn, New York*, 737 F.Supp. 749, ____ (E.D.N.Y. 1990). Others have held that, even if a claimant has knowledge of drug activity, he may avoid forfeiture by establishing that the illegal activity took place without his consent. *See United States* v. *Parcel of Real Property Known as 6109 Grubb Road, Millcreek Township Erie County, Pennsylvania*, 886 F.2d 618, 626 (3d Cir.), *reh'g denied*, 890 F.2d 659 (1989); *United States* v. *Sixty (60) Acres, More or Less With Improvements, Located in Etowah County, Alabama*, 727 F.Supp. 1414, 1418-19 (N.D. Ala.), *vacated on other grounds*, 736 F.Supp. 1579 (1990); *United States* v. *Certain Real Property and Premises Known as 171-02 Liberty Avenue, Queens, New York*, 710 F.Supp. 46, 49-50 (E.D.N.Y. 1989). *See generally* Note, *The Innocent Owner Defense to Real Property Forfeiture Under the Comprehensive Crime Control Act of 1984*, 58 Fordham L. Rev. 471, 478-86 (1989) [hereinafter Note, *Real Property Forfeiture*] (discussing the different constructions of phrase "without the knowledge or consent" in section 881(a)(7)). We conclude that a claimant may avoid forfeiture by establishing either that he had no knowledge of the narcotics activity or, if he had knowledge, that he did not consent to it.

The plain language of section 881(a)(7) is, at best, confusing. It states that no real property may be forfeited if the claimant establishes that drug activity took place there "without the knowledge or consent" of the claimant. Congress' use of the disjunctive "or" suggests that a claimant should succeed by establishing either lack of knowledge or lack of consent. *See Grubb Road*, 886 F.2d at 626; *Liberty Avenue*, 710 F.Supp. at 50. On the other hand, inclusion of the word "without" before the phrase "knowledge or consent" might be interpreted to mean that an innocent owner must be without *both* knowledge and consent. *See 418 57th Street*, 737 F.Supp. at ____; Note, *Real Property Forfeiture*, *supra*, at 480-82; *see also Grubb Road*, 890 F.2d at 661 (Greenberg, *J.*, dissenting from denial of petition for rehearing). We believe that the ordinary meaning of the word "consent" dictates the construction we adopt.

Consent is "compliance or approval esp[ecially] of what is done or proposed by another." Webster's Third New International Dictionary 482 (1971). In order to comply with or approve of something, it is only common sense that one must have knowledge of it. Thus, in order to consent to drug activity, one must know of it. If we were to construe section 881(a)(7) to mean that a claimant's knowledge alone precludes the innocent owner defense (*i.e.*, that a claimant must disprove both knowledge and consent), then "consent" as used in the statute would be totally unnecessary. In other words, the factfinder would never reach the issue of consent once it concluded that the claimant had knowledge. Similarly, under this construction it would be necessary to determine whether the claimant consented only if the factfinder first concluded that the claimant did *not* have knowledge of the drug activity, a result that cannot be

squared with the ordinary meaning of the word "consent."

Congress intended forfeiture to be a powerful weapon in the war on drugs. *See* S. Rep. No. 225, 98th Cong., 2nd Sess. 191-92, *reprinted in* 1984 U.S. Code Cong. & Admin. News 3182, 3374-75. This stated purpose has influenced some courts to require a claimant to disprove both knowledge and consent to avoid forfeiture. *See Lot 111-B*, 902 F.2d at 1445 ("[congressional] policy would be substantially undercut if persons who were fully aware of the illegal connection or source of their property were permitted to reclaim the property as 'innocent' owners"). We cannot agree that allowing a claimant to avoid forfeiture by establishing lack of consent will undermine congressional intent. The inclusion of an express defense in the statute indicates that Congress had no desire to see innocent owners lose their property. *See* Note, *Tempering the Relation-Back Doctrine: A More Reasonable Approach to Civil Forfeiture in Drug Cases*, 76 Va. L. Rev. 165, 169-71 (1990) (Congress' "normal pattern" is to couple stronger forfeiture provisions with increased innocent owner protection). Requiring a claimant to disprove both knowledge and consent ignores Congress' desire to preserve the property of innocent owners and, as indicated, renders the phrase "or consent" superfluous, a result that should be avoided. *See, e.g., United States* v. *Menasche*, 348 U.S. 528, 538-39 (1955); *United States* v. *Berrios*, 869 F.2d 25, 28-29 (2d Cir. 1989).

b. *What Constitutes Consent?*

Having determined that a claimant with knowledge of narcotics trafficking may prevent forfeiture by proving

that he did not consent to it, we turn to the issue of what constitutes consent. More specifically, to show lack of consent must a claimant prove that he did all that reasonably could be expected to prevent the illegal activity once he learned of it? We conclude that he must.

The district court's instruction on this point is derived from dictum in *Calero-Toledo* v. *Pearson Yacht Leasing Co.*, 416 U.S. 663 (1974). In *Calero-Toledo*, the Court upheld forfeiture pursuant to a Puerto Rican statute, of a yacht on which marijuana was found, although the owner of the yacht was uninvolved in and unaware of the illegal activity. *Id.* at 680-90. The Court stated that forfeiture of an innocent owner's property might be unconstitutional if the owner "had done all that reasonably could be expected to prevent the proscribed use of his property." *Id.* at 689. Several courts have applied this constitutional standard to real property forfeiture cases, apparently on the theory that Congress intended to incorporate this standard into the innocent owner defense of section 881(a)(7). *See, e.g., United States* v. *Premises Described as Route 2, Box 61-C, Crossett, Arkansas*, 727 F.Supp. 1295, 1299 (W.D. Ark. 1990); *United States* v. *One Parcel of Real Estate at 11885 S.W. 46 Street, Miami Florida*, 715 F.Supp. 355, 357-58 (S.D. Fla. 1989); *United States* v. *Real Property Located at 2011 Calumet, Houston, Texas*, 699 F.Supp. 108, 110 (S.D. Tex. 1988). Other courts have rejected the *Calero-Toledo* standard, usually on the basis that Congress would have made an explicit reference to the standard if it wished to incorporate it. *See, e.g., United States* v. *Lots 12, 13, 14, and 15, Keeton Heights Subdivision, Morgan County, Kentucky*, 869 F.2d 942, 946-47 (6th Cir. 1989); *Liberty Avenue*, 710 F.Supp. at 49-50. *See*

generally Note, *Real Property Forfeiture*, *supra*, at 486-89.

While the legislative history of section 881(a)(7) makes no explicit reference to the *Calero-Toledo* standard, this should not preclude its application. Congress has left to the courts the task of interpreting and refining the term "consent." We find the *Calero-Toledo* standard appropriate for section 881(a)(7) forfeiture cases because, when combined with our construction of the phrase "knowledge or consent," it provides a balance between the two congressional purposes of making drug trafficking prohibitively expensive for the property owner and preserving the property of an innocent owner. A claimant with knowledge of the illegal use to which his property is put may defend on the basis of lack of consent, but consent in this situation must be something more than a state of mind. The illicit sale and use of drugs is taking an ever increasing toll on our nation. These activities affect almost every aspect of modern existence, particularly in large urban centers like New York City. Given the present circumstances, defining "consent" in section 881(a)(7) as the failure to take all reasonable steps to prevent illicit use of premises once one acquires knowledge of that use is entirely appropriate.[3]

Applying this standard to the present case, the jury's conclusion that Realty Corp. did not take all reasonable

---

3 Our use of the *Calero-Toledo* standard to define the term "consent" differs from the approach taken by some other courts, which have required innocent owners to prove both (1) that they were without knowledge or consent, *and* (2) that they took all reasonable steps to prevent the narcotics activity prior to acquiring any knowledge of it. *See generally* Goldsmith & Linderman, *Asset Forfeiture and Third Party Rights: The Need for Further Law Reform*, 1989 Duke L.J. 1254, 1274-76 (discussing 21 U.S.C. § 881(a)(6), which contains an innocent owner defense identical to that of section 881(a)(7)).

steps to prevent the narcotics trafficking was more than supported by the evidence. Realty Corp. admittedly took no steps to curb the drug activity until after the June 2, 1988 raid. According to Realty Corp., this was the first time that it had any idea that narcotics transactions were taking place on the premises. Once Mark Hersh learned of the raid, he instructed Morris Nahmias not to accept rent from the tenants who had been arrested, and called his lawyer. The jury concluded either that Realty Corp. knew of the narcotics activity before June 2, 1988 and took no steps to stop it, or that Realty Corp.'s response after learning of the raid was inadequate. Either conclusion is supported by the evidence.

C. *Forfeiture of the Entire Building*

Realty Corp. contends that section 881(a)(7) allows only property actually connected to narcotics activity to be forfeited, and therefore only the fifteen apartments seized were subject to forfeiture. Realty Corp. further argues that, if the statute permits forfeiture of the entire building, then the statute amounts to disproportionate punishment in violation of the Eighth Amendment. Neither argument has merit.

1. *The Statute*

In *Livonia Road*, we specifically left open the question whether section 881(a)(7) permits forfeiture of an entire tract of real property when only part of it is used to facilitate narcotics trafficking. *See* 889 F.2d at 1270. We now hold that the plain language of the statute indicates Congress' intent that an entire parcel of land may be subject to forfeiture even if only part of it is directly connected to drug activity. In reaching this conclusion we join the other Courts of Appeals that have consid-

ered this question, all of which have adopted this interpretation of the statute. *See United States* v. *One 107.9 Acre Parcel of Land Located in Warren Township, Bradford County, Penna.*, 898 F.2d 396, 400 (3d Cir. 1990); *United States* v. *A Parcel of Land with a Building Located Thereon at 40 Moon Hill Road, Northbridge, Massachusetts*, 884 F.2d 41, 45 (1st Cir. 1989); *United States* v. *Santoro*, 866 F.2d 1538, 1543 (4th Cir. 1989); *United States* v. *Tax Lot 1500, Township 38 South, Range 2 East, Section 127, Further Identified as 300 Cove Road, Ashland, Jackson County, Oregon*, 861 F.2d 232, 235 (9th Cir. 1988), *cert. denied*, 110 S.Ct. 364 (1989).

Section 881(a)(7) provides that "the whole" of any tract of land used "in any manner or part" to facilitate narcotics distribution is subject to forfeiture. Although the words "in any manner or part" might be construed to mean only that property is subject to forfeiture if it is used partially for drug activity and partially for legitimate purposes, *see Livonia Road*, 889 F.2d at 1270, the more natural construction is that "the whole" of any tract of land is subject to forfeiture if any "part" of it is used to facilitate narcotics activity. This interpretation finds support in the legislative history as well. Congress enacted the bill that contains section 881(a)(7) "to enhance the use of forfeiture . . . as a law enforcement tool in combatting two of the most serious crime problems facing the country: racketeering and drug trafficking." S. Rep. No. 225, 98th Cong., 2nd Sess. 191, *reprinted in* 1984 U.S. Code Cong. & Admin. News 3182, 3374. Congress intended the bill "to eliminate the statutory limitations and ambiguities that have frustrated active pursuit of forfeiture by Federal law enforcement agencies." *Id.* at 192, *reprinted in* 1984

U.S. Code Cong. & Admin. News at 3375. Interpreting the statute to permit forfeiture of entire parcels of real property gives effect to this congressional intent to eliminate ambiguities and to attack the assets that facilitate criminal activity.

In holding that the statute permits forfeiture of Realty Corp.'s apartment building, we do not decide the precise limits of permissible forfeiture under the statute. We merely hold that, in this case, given the extent of the narcotics trafficking and its distribution throughout the building, it was not error for the district court to instruct the jury that the building as a whole, rather than specific apartments, was subject to forfeiture.

2. *The Eighth Amendment*

Realty Corp.'s argument that forfeiture of the entire building violates the Eighth Amendment is entirely without merit. Several courts have concluded that the Eighth Amendment's protections do not apply in civil forfeiture actions brought under section 881(a)(7) because forfeiture is a civil, remedial measure, not punishment for a crime. *See One 107.9 Acre Parcel of Land*, 898 F.2d at 400-01; *40 Moon Hill Road*, 884 F.2d at 43-45; *Santoro*, 866 F.2d at 1543-44; *Tax Lot 1500*, 861 F.2d at 234-35. We have previously suggested, however, that in some situations "a forfeiture [might] cross the line of condemning an instrumentality of crime and move into the area of punishing a defendant by depriving him of his estate." *Livonia Road*, 889 F.2d at 1270; *see also United States* v. *One Parcel of Real Estate Commonly Known as 916 Douglas Avenue, Elgin, Illinois*, 903 F.2d 490, 495 (7th Cir. 1990) (Flaum, *J.*, concurring); *Premises Known as 3639-2nd St.*, 869 F.2d at 1098 (Arnold,

J., concurring). In the present case, we fail to see how the Eighth Amendment's proportionality requirement applies. *See Solem* v. *Helm*, 463 U.S. 277, 284 (1983) (Eighth Amendment proscribes punishment that is "disproportionate to the crime committed"). Neither Realty Corp. nor its agents has been charged with or convicted of a crime. The actions of the tenants, not Realty Corp., rendered the building subject to forfeiture. Under these circumstances, we agree with the Ninth Circuit that proportionality review, which asks whether a defendant deserves the punishment, is irrelevant. *See Tax Lot 1500*, 861 F.2d at 234-35.

Assuming for the sake of argument that the Eighth Amendment's protections do extend to Realty Corp., the line at which forfeiture becomes disproportionate punishment or an excessive fine certainly has not been crossed in this case where apartments on every floor of the building—amounting to at least one third of all of the apartments in the building—were used for narcotics trafficking. Furthermore, addicts regularly smoked crack in the hallways. Thus, common areas of the building also were involved in these illicit activities.

D. *Conduct and Rulings of the District Court*

Realty Corp.'s remaining arguments do not warrant extended discussion. Realty Corp. argues that Lieutenant Becker of the New York City police was improperly allowed to give hearsay testimony that he suspected the narcotics activity to be taking place with the consent of the building's owner. This claim is frivolous because Lieutenant Becker's testimony was not hearsay. It was not offered to prove the truth of Realty Corp.'s consent to the narcotics trafficking. *See* Fed. R. Evid. 801(c).

Rather, it was offered to show why Lieutenant Becker chose not to contact the building's owner when he began his investigation.

Realty Corp. contends that the district court committed reversible error by expressing its view on the credibility of Realty Corp.'s witnesses through questioning and by giving its opinion that Mark Hersh had done nothing to prevent the narcotics activity. This claim is unpersuasive. A district court may conduct limited questioning of witnesses to clarify the issues, *see, e.g.*, *United States* v. *Vega*, 589 F.2d 1147, 1152-53 (2d Cir. 1978), and the record indicates that Judge Conboy's questioning was neither excessive nor overly suggestive. Moreover, the district court specifically instructed the jury that they were to draw no inferences from the court's questions.

Realty Corp. also argues that it was unfairly prejudicial to allow the jury to see a videotape made by the police during the June 2, 1988 raid showing large amounts of cash and narcotics in the building. Realty Corp. claims that the tape had little probative value on the issue of Realty Corp.'s knowledge of the narcotics activity because the tape showed only the interior of apartments, not areas visible from the doors of the apartments. We agree with the district court that the tape was relevant to the issue of Realty Corp.'s knowledge because the jury reasonably could have inferred that Mark Hersh and Morris Nahmias had viewed at least some of the sparsely furnished apartments shown on the tape. A district court enjoys wide discretion in balancing the probative value of evidence against its prejudicial effect, *see United States* v. *Smith*, 727 F.2d

214, 220 (2d Cir. 1984), and we cannot say that the court abused its discretion in this case.

We have considered Realty Corp.'s remaining contentions and find them to be without merit.

CONCLUSION

Seizure of the building without prior notice and an opportunity to be heard did not deprive Realty Corp. of property without due process of law. The district court correctly ruled that Morris Nahmias was an agent of the corporation, and properly instructed the jury on the innocent owner defense contained in 21 U.S.C. § 881(a)(7). Forfeiture of the entire building is permitted by the statute and does not violate the Eighth Amendment. The district court's rulings and conduct did not deprive Realty Corp. of a fair trial.

The judgment of the district court is affirmed.

CONSTITUTIONAL AND STATUTORY PROVISIONS

1. The Fourth Amendment to the United States Constitution provides:

"The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

2. The Fifth Amendment to the United States Constitution provides in ertinent part:

"No person shall be ... deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

3. 21 U.S.C. §881(a)(7) provides:

"(a) Property Subject
The following shall be subject to forfeiture to the United States and no property right shall exist in them:

. . .

(7) All real property, including any right, title and interest (including any leasehold interest) in the whole of any lot or tract of land and any appurtenances or improvements, which is used, or intended to be used, in any manner or part, to commit, or to facilitate the commission of, a violation of this title punishable by more than one year's imprisonment, except that no property shall be forfeited under this paragraph, to the extent of an interest of an owner, by reason of any act or ommission established by that owner to have been committed or ommitted without the knowledge or consent of that owner."

4. New York Penal Law ' 20.20 provides in pertinent part:

"Criminal liability of corporations

1. As used in this section:

(a) "Agent" means any director, officer or employee of a corporation, or any other person who is authorized to act in behalf of the corporation.

(b) "High managerial agent" means an officer of a corporation or any other agent in a position of comparable authority with respect to the formulation of corporate policy or the supervision in a managerial capacity of subordinate employees.

2. A corporation is guilty of an offense when: ...

(b) The conduct constituting the offense is engaged in, authorized, solicited, requested, commanded, or recklessly tolerated by the board of directors or by a high managerial agent acting within the scope of his employment and in behalf of the corporation; or

(c) The conduct constituting the offense is engaged in by an agent of the corporation while acting within the scope of his employment and in behalf of the corporation, and the offense is (i) a misdemeanor or a violation, (ii) one defined by a statute which clearly indicates a legislaive intent to impose such criminal liability on a corporation, ...".

5. New York Real Property Actions and Proceedings Law §853 provides in pertinent part:

"Action for forcible or unlawful entry or detainer; treble damages.

If a person is disseized, ejected, or put out of real property in a forcible or unlawful manner, or, after he has been put out, is held and kept out by force or by putting him in fear of personal violence or by unlawful means, he is entitled to recover treble damages in an action therefore against the wrongdoer.

(2)

No. 90-781

Supreme Court, U.S.
FILED
JAN 17 1991
JOSEPH F. SPANIOL, JR.
CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1990

141ST STREET CORPORATION, BY MARK HERSH, ETC.,
PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

KENNETH W. STARR
Solicitor General

ROBERT S. MUELLER, III
Assistant Attorney General

J. DOUGLAS WILSON
Attorney
Department of Justice
Washington, D.C. 20530
(202) 514-2217

QUESTIONS PRESENTED

1. Whether the district court erred in imputing to petitioner its agent's knowledge of and consent to drug trafficking in petitioner's apartment building.

2. Whether the jury at the trial to obtain forfeiture of petitioner's property was properly instructed that petitioner was not an innocent owner of the property unless petitioner could establish that it had done all that reasonably could be expected to prevent the illegal use of its property.

3. Whether due process required that petitioner receive notice of and an opportunity to be heard prior to the government's seizure of petitioner's apartment building.

TABLE OF CONTENTS

	Page
Opinion below	1
Jurisdiction	1
Statement	1
Argument	5
Conclusion	13

TABLE OF AUTHORITIES

Cases:

Calero-Toledo v. *Pearson Yacht Leasing Co.*, 416 U.S. 663 (1974)	8, 12
Center v. *Hampton Affiliates Inc.*, 66 N.Y.2d 782, 488 N.E.2d 828, 497 N.Y.S.2d 898 (1985)	6
INS v. *Lopez-Mendoza*, 468 U.S. 1032 (1984)	13
Investors Funding Corp., In re, 523 F. Supp. 533 (S.D.N.Y. 1980)	6
Mathews v. *Eldridge*, 424 U.S. 319 (1976)	11
NAACP v. *New York*, 413 U.S. 345 (1973)	7
New York v. *Burger*, 482 U.S. 691 (1987)	11
New York v. *Harris*, 110 S. Ct. 1640 (1990)	12
Prudential-Bache Securities, Inc. v. *Citibank, N.A.*, 73 N.Y.2d 263, 536 N.E.2d 1118, 539 N.Y.S.2d 699 (1989)	5-6
United States v. *Lots 12, 13, 14 and 15, Keeton Heights*, 869 F.2d 942 (6th Cir. 1989)	9
United States v. *One (1) 1971 Harley-Davidson Motorcycle*, 508 F.2d 351 (9th Cir. 1974)	12-13
United States v. *One 1975 Pontiac Le Mans*, 621 F.2d 444 (1st Cir. 1980)	12
United States v. *One 1978 Mercedes Benz, Four-Door Sedan*, 711 F.2d 1297 (5th Cir. 1983)	12
United States v. *One 1981 Datsun 280ZX*, 644 F. Supp. 1280 (E.D. Pa. 1986)	10
United States v. *Parcel of Real Property Known As 6109 Grubb Road*, 886 F.2d 618 (3d Cir. 1989)	9
United States v. *Premises Known As 171-02 Liberty Avenue*, 710 F. Supp. 46 (E.D.N.Y. 1988)	10

Cases—Continued: Page

United States v. *Premises and Real Property at 4492 S. Livonia Road*, 889 F.2d 1258 (2d Cir. 1989) 12

Constitution and statutes:

U.S. Const.:
Amend. V (Due Process Clause) 4, 11
Amend. VIII 5
21 U.S.C. 881(a) 8
21 U.S.C. 881(a)(7) 4, 5, 8, 9
21 U.S.C. 881(d) 4

In the Supreme Court of the United States

OCTOBER TERM, 1990

No. 90-781

141ST STREET CORPORATION, BY MARK HERSH, ETC., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 5a-29a) is reported at 911 F.2d 870.

JURISDICTION

The judgment of the court of appeals was filed on August 17, 1990. The petition for a writ of certiorari was filed on November 15, 1990. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

After a jury trial in the United States District Court for the Southern District of New York, petitioner's property, a building on West 141st Street in Manhattan, was ordered forfeited to the United States. The court of appeals affirmed.

1. Between December 1986 and May 1988, New York City police received numerous complaints of drug trafficking in petitioner's 41-unit apartment building located at 617 West 141st Street.[1] The complaints alleged that drug activity was taking place in 24 apartments on all six floors of the building. Pet. App. 7a-8a; Gov't C.A. Br. 4. Five search warrants were executed at the building prior to May 1988, and more than 20 arrests had occurred there. Gov't C.A. Br. 4. Investigation of the building revealed that its common areas were littered with crack vials and pipes, that lookouts constantly were posted in front of the building, and that "steerers," who direct drug buyers to sellers, loitered outside the building and in the lobby. Pet. App. 8a.

In 1987, police officers repeatedly attempted to contact Mark Hersh, petitioner's president and principal stockholder. Hersh failed to respond to several telephone calls and to a letter asking him to come to the local precinct house to discuss drug trafficking in the building. Pet. App. 8a. Also during 1987, a police officer spoke to Morris Nahmias, Hersh's uncle and the superintendent of the building, about the drug trafficking there. Nahmias, who also acted as petitioner's rental agent, rent collector, and corporate representative, denied that any drug activity was occurring in the building. *Ibid.*; Gov't C.A. Br. 7. On three occasions, the officer asked Nahmias to tell Hersh to call the officer, but Hersh never called the officer. Gov't C.A. Br. 7. One of the residents of the building complained directly to Hersh about drug dealers on his floor. Pet. App. 17a. Hersh also visited

---

[1] The evidence at trial is set forth in the court of appeals' decision and the government's brief in that court.

the building on more than 100 occasions between 1982 and 1988 and spoke with Nahmias on a weekly basis. *Ibid.* Nahmias accepted bribes from drug traffickers to keep the elevators in the building running in order to facilitate drug trafficking, and he charged exorbitant rents to lease apartments solely for the purpose of selling drugs. *Id.* at 16a.

When police officers began an investigation of drug trafficking in the building in May 1988, they deliberately decided not to contact the owners of the building. The officers concluded that, given the level of drug activity at the building and the prior fruitless attempts to contact Hersh, the owners were aware of the drug trafficking and were possibly in league with the drug traffickers. Pet. App. 8a; Gov't C.A. Br. 5.

In May and June 1988, undercover officers purchased crack cocaine in several apartments in the building. During these purchases, the officers learned that an alarm system designed to alert the occupants of the apartments to police presence ran from a central connection box on the roof to eight apartments in the building. Pet. App. 8a-9a. On June 2, 1988, pursuant to a valid warrant, officers searched these eight apartments, found a kilogram of crack cocaine, weapons, and cash, and arrested 26 people. Two weeks later, after additional undercover drug purchases, officers executed another warrant to search nine more apartments in the building, and uncovered four pounds of cocaine, cash, and weapons. *Id.* at 9a.

On June 24, the same day that the second search warrant was issued, authorities obtained a warrant from a United States Magistrate to seize the entire building and the leasehold interests of 15 people in the building. Pet. App. 9a. On June 29, the govern-

ment seized the building, sealed 15 apartments, and arrested 12 persons. *Ibid.*

2. On July 7, 1988, the government filed a complaint seeking forfeiture of the building pursuant to 21 U.S.C. 881(a)(7). Petitioner filed a claim to the building, asserting that it was an "innocent owner" within the meaning of Section 881(a)(7). Before trial, the district court ruled that any knowledge of or consent to illegal activity by Morris Nahmias in the building would be imputed to petitioner, because Nahmias acted as petitioner's agent. Pet. App. 4a, 9a-10a. In the same order, the court denied as untimely a motion by Stanley Weg, who claimed to be a shareholder in the corporation, to intervene in the action. The court also noted that as a shareholder, Weg had no standing to intervene in the forfeiture proceeding. *Id.* at 4a.

At trial, after hearing the government's evidence of drug trafficking in the building, the court held that the government had shown probable cause to believe that the building was used to facilitate felony drug trafficking within the meaning of 21 U.S.C. 881(d). For this reason, the only issue submitted to the jury was whether the narcotics trafficking in the building took place without petitioner's knowledge or consent. Pet. App. 10a.

3. The court of appeals affirmed. Pet. App. 5a-29a. It first ruled that the ex parte seizure of the building on June 29, 1988, did not violate the Due Process Clause. *Id.* at 11a-15a. It found that the government's interest in halting persistent drug dealing in the building, when coupled with Hersh's failure to respond to police inquiries, outweighed petitioner's interest in "ownership and possession of an apartment building solely for commercial purposes." *Id.* at 12a. The court also held that the district court

had not erred in imputing to petitioner Morris Nahmias's knowledge of and consent to drug dealing in the building. *Id.* at 16a-17a.

The court next rejected petitioner's challenge to the district court's jury instructions. It held that the district court properly instructed the jury that petitioner could prevail either by showing that it did not know of drug trafficking at the building or that it did not consent to the drug trafficking. Pet. App. 17a-21a. In addition, the court of appeals upheld the district court's instruction that to show lack of consent, petitioner had to establish that once it learned of illegal conduct, it had done all that it reasonably could to prevent the illegal use of its premises. *Id.* at 21a-24a.[2]

ARGUMENT

1. Petitioner first contends that the district court erred in imputing to petitioner its agent Nahmias's knowledge of or his consent to drug trafficking in the building. Petitioner concedes that Nahmias was its agent, but petitioner claims that Nahmias acted outside the scope of his employment and adversely to petitioner's interests and that, therefore, it should not have been held responsible for his acts. Pet. 8-16. That fact-bound claim is without merit.

Under New York law, an agent's knowledge and actions are imputed to his principal unless the agent has completely abandoned the principal's purpose and acted entirely for his own or another's purposes. See *Prudential Bache Securities, Inc.* v. *Citibank, N.A.*,

---

[2] The court also held that Section 881(a)(7) allowed the government to forfeit the entire building on West 141st Street, not just the 15 apartments connected to drug trafficking, and that so construed the statute does not violate the Eighth Amendment prohibition against cruel and unusual punishments. Pet. App. 24a-27a.

73 N.Y.2d 263, 276, 536 N.E.2d 1118, 1125, 539 N.Y.S.2d 699, 706 (1989); *Center* v. *Hampton Affiliates Inc.*, 66 N.Y.2d 782, 785, 488 N.E.2d 828, 497 N.Y.S.2d 898, 900 (1985); *In re Investors Funding Corp.*, 523 F. Supp. 533, 541 (S.D.N.Y. 1980). Here, as the court of appeals held, Nahmias's actions themselves were not adverse to petitioner. Nahmias acted as petitioner's managing agent at the building. In that role, he leased apartments and maintained the building. His involvement in drug trafficking at the building came as part of his performance of these duties. Pet. App. 7a-9a, 16a. In addition, Nahmias derived considerable profit from his illegal activities, and petitioner put on no evidence to discharge its burden of showing that it did not share in these profits. *Ibid.* Moreover, even if Nahmias did not share his excess profits with petitioner, his actions ensured that the apartments in the building remained rented and that rentals continued to flow to petitioner. Thus, he had not abandoned his role as petitioner's agent.

In any event, the court of appeals correctly found that the district court's imputation of Nahmias's actions to petitioner was of no significance because the jury could have concluded that Hersh, petitioner's president and principal stockholder, knew about the extensive and persistent drug trafficking in the building, yet he failed to take any action. Pet. App. 17a. Police officers repeatedly left messages at Hersh's office about the drug trafficking at the building; the officers sent Hersh a letter informing him of the problem and asking for his assistance; a tenant of the building complained to Hersh about drug dealing on his floor; and Hersh personally visited the building frequently and therefore must have seen the clear evidence of ongoing drug trafficking. Accordingly,

the jury had direct proof that Hersh knew and yet did nothing about the drug trafficking at the building. Under these circumstances, it is irrelevant that Nahmias's knowledge and conduct were imputed to petitioner.[3]

2. Petitioner argues that the district court erred by instructing the jury that to show its lack of consent to drug trafficking at the building, petitioner had to establish that it had done all that reasonably could be expected of it to prevent the illegal use of its premises. Pet. 16-18.[4] The court of appeals correctly upheld this jury instruction.

---

[3] Petitioner also claims that the district court erred in denying shareholder Stanley Weg's motion to intervene. Pet. 9, 14-15. The district court denied Weg's motion on the ground that it was untimely, however, and petitioner did not raise this issue in the court of appeals. Accordingly, this Court should not consider petitioner's claim. In any event, petitioner's fact-bound claim, which is addressed to the discretion of the district court, see *NAACP* v. *New York*, 413 U.S. 345, 366 (1973) (district court has broad discretion to deny untimely motion to intervene), raises no issue warranting review by this Court.

[4] In relevant part, the district court instructed the jury as follows, Gov't C.A. Br. 23-24 (quoting C.A. Supp. App. 491-492):

> Now, one gives one's consent to something when one voluntarily allows what is planned or done by another or when one agrees or accepts a course of action. You must examine the acts or any failures to act by the claimant, such as what steps it took or might have taken to rid the property of the drug dealers, and determine whether these can be said to constitute the claimant's consent to the use of the premises in the illegal manner alleged.
>
> I instruct you that once an owner or his agent is on actual notice of illegal conduct involving the owner's leased property the owner has a duty to do all that rea-

The forfeiture statute, 21 U.S.C. 881(a)(7), provides for the forfeiture of any real property that is used to commit a controlled substance violation. The statute, however, contains an exception for property otherwise subject to forfeiture if the owner can show that the act giving rise to the forfeiture was "committed * * * without [his] knowledge or consent." In construing the consent element of that exception, the Second Circuit drew upon *Calero-Toledo* v. *Pearson Yacht Leasing Co.*, 416 U.S. 663, 689 (1974), which stated in dicta that forfeiture of an innocent owner's property may be unconstitutional if the owner "had done all that reasonably could be expected to prevent the proscribed use of his property." The Second Circuit used that standard to define the absence of consent under Section 881(a)(7), because "it provides a balance between the two congressional purposes of making drug trafficking prohibitively expensive for the property owner and preserving the property of an innocent owner." Pet. App. 22a-23a.

Petitioner contends that the definition of "consent" adopted by the Second Circuit is erroneous because it is not expressly set forth in Section 881(a). Pet. 18. The statute does not define that term, however, and petitioner does not offer an alternative definition. Moreover, the Second Circuit reasonably interpreted that term in a manner that gives effect to Congress's

---

sonably could be expected to prevent the illegal use of its premises.

It is for you to decide using your common sense what actions would have comprised a reasonable response by a landlord in similar circumstances. I instruct you that the claimant is not, however, required to take vigilante or lawless actions in connection with any drug activity on its premises or to endanger the safety of its employees or to engage in conduct which would be wholly futile.

purposes. Finally, the standard adopted by the court of appeals does not require a property owner to undertake futile or dangerous efforts to curtail drug activity; that standard only requires a party to undertake reasonable steps toward that end.

Petitioner claims that the standard adopted by the court below conflicts with the standard set forth in decisions of the Third and Sixth Circuits. Pet. 17-18. The Third Circuit case, *United States* v. *Parcel of Real Property Known As 6109 Grubb Road*, 886 F.2d 618 (1989), clearly does not conflict with the decision below, since that court expressly declined to consider whether a claimant asserting an innocent owner defense must show that it did "all that reasonably could be expected." *Id.* at 627. In *United States* v. *Lots 12, 13, 14, and 15, Keeton Heights*, 869 F.2d 942, 947 (6th Cir. 1989), the court stated that Section 881(a)(7) "imposes no requirement that a person who claims the status of 'innocent owner' establish that he has done all that he could reasonably be expected to do to prevent the proscribed use of his property." According to the court, "[i]t is enough, under the statute, that the owner establish that the proscribed act was committed 'without the knowledge or consent of that owner.'" 869 F.2d at 947. That statement, however, was dicta, since the court ruled that the government had not properly put the claimant's knowledge or consent in issue at all. *Ibid.* In addition, the court of appeals evidently considered the "all that reasonably could be expected" standard in the context of the claimant's assertion that she fulfilled that obligation and therefore the property could not be constitutionally forfeited, rather than in the context of an assertion that the standard was an appropriate test for consent under the statute. *Id.* at 946-947. Moreover, the Sixth Circuit did

not explain what are the elements or coutours of the consent standard. When confronted with a case requiring a definition of the absence of consent, the Sixth Circuit may adopt a standard that is indistinguishable from the one adopted by the court of appeals here. Under these circumstances, the Sixth Circuit cannot be said to have fully considered and rejected the standard adopted by the court below. Review of the asserted conflict between the decision below and in *Keeton Heights* would therefore be premature.[5]

In any event, petitioner could not satisfy even the least demanding definition of the term "consent." The government showed that petitioner's agents, including its president and chief shareholder Hersh, knew about a long-standing and virulent drug problem at their building, but did nothing to terminate it. Instead, petitioner's superintendent and rental agent actively sought to further the drug trafficking in the building. Hersh ignored repeated police attempts to enlist his aid in curtailing drug dealing in the building. Indeed, Hersh failed to take any meaningful steps to rid the building of drug dealers after the June 2, 1988, raid on the building. Thus, the government here provided sufficient evidence to allow a jury

---

[5] Petitioner also asserts that two district court decisions conflict with the Second Circuit's decision here. See *United States* v. *Premises Known As 171-02 Liberty Avenue*, 710 F. Supp. 46 (E.D.N.Y. 1988); *United States* v. *One 1981 Datsun 208ZX*, 644 F. Supp. 1280 (E.D. Pa. 1986). In the *Liberty Avenue* case, however, the district court found that the property owner had done everything that was *reasonable* under the circumstances; it held that the additional steps that the government argued that the owner should have taken were unreasonable. In *One Datsun 280ZX*, the court found that the claimant had done all that could be expected to prevent the illegal use of the vehicle in question. 644 F. Supp. at 1288.

instructed under a more lenient standard to conclude that petitioner consented to the drug trafficking. Accordingly, because petitioner could not prevail even under the most lenient standard, its claim does not warrant further review.

3. Petitioner contends that the initial ex parte seizure of the West 141st Street building on June 29, 1988, violated the Due Process Clause of the Fifth Amendment. In particular, petitioner argues that it was entitled to notice and a hearing prior to the initial seizure of the building. Pet. 18-21. That claim also does not warrant further review.

The determination of the process due before a seizure of property requires use of the balancing test set forth in *Mathews* v. *Eldridge*, 424 U.S. 319, 335 (1976). That test requires a court to evaluate three factors: the significance of the property interest at stake; the risk of an erroneous deprivation through the procedures used and the probable value of additional procedural safeguards; and the government's interest in pre-notice seizure. The court of appeals applied that test in this case and correctly held that petitioner received the process that was due. See Pet. App. 11a-15a.

As the court of appeals found, petitioner's purely commercial interest in the building, although significant, is not of the same weight as a homeowner's interest in his or her property. "An expectation of privacy in commercial premises * * * is different from and indeed less than, a similar expectation in an individual's home." *New York* v. *Burger*, 482 U.S. 691, 700 (1987). Petitioner was deprived only of the income from the property, not of the abode of any of its owners or officers. Second, the risk of erroneous deprivation was minimized by the probable cause hear-

ing before the magistrate. Third, the government had a substantial interest in seizing the building without notice to petitioner. Prior investigation had suggested that petitioner's employees and officers knew of and were involved in the extensive drug trafficking in the building. In addition, the drug trafficking at the building had survived several prior police raids, including a search of eight apartments in the building on June 2, 1988, three weeks before the seizure of the building, that had resulted in 26 arrests and the seizure of several weapons. Thus, seizure of the property without notice not only was necessary to ensure that drug trafficking at the building was finally brought to an end, but also to help ensure the safety of the police officers involved in the June 29 search and seizure and of innocent tenants of the building. See *Calero-Toledo* v. *Pearson Yacht Leasing Co.*, 416 U.S. at 679 (seizure without prior notice justified because seizure prevented further illicit use of the property).

Even if petitioner were correct that it was entitled to preseizure notice, its claim would not warrant review. Just as an illegal arrest does not render a person immune from prosecution, *e.g.*, *New York* v. *Harris*, 110 S. Ct. 1640, 1643 (1990), so, too, the illegal seizure of property does not immunize that property from forfeiture. *United States* v. *Premises and Real Property at 4492 S. Livonia Road*, 889 F.2d 1258, 1265-1266 (2d Cir. 1989); *United States* v. *One 1978 Mercedes Benz, Four-Door Sedan*, 711 F.2d 1297, 1302-1303 (5th Cir. 1983); *United States* v. *One 1975 Pontiac Le Mans*, 621 F.2d 444, 450-451 (1st Cir. 1980); *United States* v. *One (1) 1971 Harley-Davidson Motorcycle*, 508 F.2d 351 (9th Cir.

1974). See *INS* v. *Lopez-Mendoza*, 468 U.S. 1032, 1040 (1984). Petitioner had a full trial on the merits of its claim that the government did not have the right to seize its property.[6] Accordingly, the legality of the seizure has been established at a trial on the merits, and any error in the June 29, 1988, seizure without notice does not undermine the integrity of the judgment entered at the trial. In short, as the court of appeals concluded, "[t]he high level of ongoing narcotics trafficking in the building, coupled with [petitioner's] opportunity to contest the forfeiture at trial [shows] that issuance of the seizure warrant by a neutral and detached magistrate was all the process that was due." Pet. App. 14a-15a. Consequently, petitioner's claim does not merit review.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

KENNETH W. STARR
Solicitor General

ROBERT S. MUELLER, III
Assistant Attorney General

J. DOUGLAS WILSON
Attorney

JANUARY 1991

---

[6] Petitioner never requested an evidentiary hearing before trial on the merits of the seizure; nor did petitioner move to dismiss the the forfeiture proceeding because of the illegality of the seizure. Gov't C.A. Br. 21.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1991 282061 20308